No.

IN THE

Supreme Court of the United States

October Term, 1991

MARVIN H. GREENE and LAKE ANNE REALTY CORP.,

Petitioners,

against

TOWN OF BLOOMING GROVE, SUPERVISOR AND TOWN BOARD OF THE TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE and BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CHARLES G. MILLS
Counsel of Record for the Petitioner
56 School Street
Glen Cove, NY 11542
(516) 759-4300

DAREN A. RATHKOPF
Co-Counsel for Petitioner

THE REPORTER COMPANY, INC., 30 Vesey St., New York, NY 10007—1991
NYC 212-732-6978 Westchester 914-681-1322 Long Island 516-222-0221
(7036—LC4-683)

Questions Presented for Review

1. Does a United States district court have jurisdiction to include, in its discretion, a declaration of the property rights of plaintiffs in a judgment (as a pendent state law claim) if:

> (i) the complaint demands the declaratory judgment; and
>
> (ii) sets forth all the facts necessary to state a claim for it under state law, although not as some form of separately identified claim under state law;
>
> (iii) the court of appeals has previously remanded the case to try the extent of the plaintiffs' disputed property rights under state law;
>
> (iv) the pretrial order identifies the declaratory judgment as a separate item of relief demanded by the plaintiffs;
>
> (v) the extent of the property rights has been submitted to the jury by means of an agreed special verdict question; and
>
> (vi) the jury has found that the plaintiffs have the disputed rights?

2. May a court of appeals strike such a declaration of the rights of the plaintiff from the judgment of the district court?

Parties

There are no parties to this case except those set forth in the caption.

Table of Contents.

Page

TABLE OF AUTHORITIES.

Page

CASES:

Page

OTHER AUTHORITIES:

Page

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

MARVIN H. GREENE AND LAKE ANNE REALTY CORP.,

Petitioners,

against

TOWN OF BLOOMING GROVE, SUPERVISOR and TOWN BOARD OF THE TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE and BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petition of Marvin H. Greene and Lake Anne Realty Corp. respectfully shows:

The petitioners seek a writ of certiorari to the United States Court of Appeals for the Second Circuit to review so much of a judgment of that court as reversed a portion of an

amended judgment of the United States District Court for the Southern District of New York, by striking from it a declaration of the rights of the plaintiffs as found by the jury in the district court. The court of appeals held that the allegations of the complaint were inadequate to support a judgment declaring rights under state law.

Reported Opinions

The opinion of the court of appeals is reported at 935 F2d 507 (1991). The judgment of the district court was made after a prior remand to that court by the court of appeals. The opinion of the court of appeals remanding the case was reported at 879 F2d 1061 (1989). There are no other reported opinions in this case. The two opinions of the district court, each reversed in part and affirmed in part by the court of appeals, may be retrieved electronically at 1988 WL 126877 and 1990 WL 165747.

Jurisdiction

The judgment of the court of appeals sought to be reviewed was made, entered and filed on June 10, 1991. A petition for rehearing, made on or before June 24, 1991, was denied by an order made, entered and filed on July 25, 1991. The judgment of the court of appeals reversed a portion of a judgment of the district court in a civil case arising under federal law. This court has jurisdiction to review the action of the court of appeals pursuant to 28 USC 1254(1).

Constitutional Provisions and Statutes Involved

The statutes, court rules and the constitutional provision involved in this case are:

28 U.S.C. § 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Federal Rule of Civil Procedure 8 (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Federal Rule of Civil Procedure 8 (e) (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

Federal Rule of Civil Procedure 8 (f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Federal Rule of Civil Procedure 10 (b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances: and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

The Seventh Amendment to the United States Constitution. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury, shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Statement of the Case

The petitioners own 136 acres previously mapped as a bungalow colony. They seek to complete the bungalow colony which would involve the construction of 419 new bungalows. The respondents dispute the petitioners' right to build bungalows in addition to those already built, arguing that the petitioners' property rights do not extend to those parts of the 136 acres still unbuilt when bungalow colonies were abolished as a new use permitted under the town's zoning ordinance. Whether the petitioners' rights extended to the whole 136 acres or only to the portion built before the change in the zoning ordinance turned on a number of disputed questions of fact.

Jurisdiction of the district court was invoked pursuant to 42 USC section 1983. The amended complaint alleged that the defendants deliberately attempted to deprive the plaintiffs of their property without due process of law.

The jury in the district court found that the petitioners' rights extended to the whole 136 acres and therefore the petitioners had the property rights which respondents had refused to recognize, but it did not find that respondents conduct rose to the level of a violation of 42 USC section 1983.

In the exercise of its discretion to entertain a pendent state claim, the district court ordered that a judgment be entered, *inter alia,* declaring the petitioners' rights as found by the jury. The amended complaint demanded a declaratory judgment and set forth the facts necessary for a declaratory judgment under local state law.

The petitioners seek review of the judgment of the court of appeals which reversed so much of the district court judgment as declared petitioners' rights.

The court of appeals reasoned that the claim for a declaratory judgment was not before the district court because it was not stated and numbered separately from the petitioners' claims arising under federal law. This case raises the question of whether the Federal Rules of Civil Procedure require the realleging and renumering of a pendent state claim which is an element of a federal claim.

The language of the Federal Rules indicate that such a repetition and renumbering is not necessary and the Eleventh Circuit has so held. The Second Circuit in the opinion sought to be reviewed has limited its prior decisions to the same effect to special circumstances and now, for the first time, set forth as the general rule that such repetition and renumbering is required.

The Facts

The petitioners are the corporate owner of the bungalow colony, which is in the town of Blooming Grove, and the sole stockholder of the corporate petitioner who is also a former owner of the bungalow colony. The respondents are the Town of Blooming Grove and municipal officials thereof. The issues raised by this petition arise out of the refusal or failure of the respondents to allow the petitioners to build bungalows on the balance of the bungalow colony.

After the existing bungalows were built the respondent town amended its zoning ordinance to eliminate bungalow colonies as a permitted use. Under New York law the bungalow colony became a nonconforming use which could be continued. The general rule in New York is that a nonconforming use cannot be expanded. Among the exceptions to this rule is the right of the owner of a vested nonconforming use to complete it if the infrastructure has been substantially built for the entirety of the project as previously planned.

Whether the plaintiffs had the right to complete the bungalow colony under one of these exceptions was a question of fact for the jury. The plaintiffs introduced into evidence a copy of a map showing that the bungalow colony was 136 acres. This copy bore the official written approval of the respondent town made when bungalow colonies were still permitted. The respondents did not concede the genuineness of the map but offered no evidence that it was forged.

The plaintiffs also introduced evidence that they had built a water supply system and other amenities for the entire 136 acre bungalow colony. The respondents attempted to prove that the water quality was inadequate. The respondents also attempted to show that completion of the bungalow colony would increase automobile traffic and that the plaintiffs had already recouped their entire investment.

The jury considered all these factual disputes and arrived at its special verdicts, more fully described below, in favor of the petitioners on the extent of their rights but in favor of defendants on the other elements of the case under 42 USC section 1983.

The Amended Complaint

The amended complaint herein contains an introductory section followed by eight claims separately numbered as "causes of action" and eight numbered demands for relief. Some of the demands for relief refer back to several or all of the claims, some to only one claim.

The third claim set forth in the amended complaint alleges that the petitioners have a vested right to construct at least 264 additional units on the bungalow colony. This claim is academic in light of the verdict that the petitioners have a right to build much more, and was not urged by the petitioners below except in the sense that, part of it was incorporated in the fourth claim.

The fourth claim in the amended complaint alleges that petitioner has a federal constitutional right to construct 419 additional units on the bungalow colony. The court of appeals erroneously believed this was in the third claim. The fourth (but not the third) claim alleges that the respondents have deliberately deprived the petitioners of their right to complete the bungalow colony without due process of law in violation of the Fourteenth Amendment and 42 USC section 1983. It is in the fourth claim that petitioners allege the approval of the 136 acre map and the construction of the infrastructure for the 136 acres as well as the wrongful removal of the filed copy of the map from the town records.

Among the allegations of the amended complaint are the following:

> 22. Plaintiffs also own a parcel of 136± acres which is used as a bungalow colony on a 10± acre portion of which there are situated 123 cottage and motel style units. . . .

32. Prior to the adoption of the aforesaid Zoning Ordinance of 1974 the plaintiffs' bungalow colony was a permitted use . . .

33. On October 17, 1973 plaintiffs applied to the defendant Planning Board for approval of a revised map which showed an additional 264 bungalow units.

41. The defendant Planning Board willfully, wrongfully and deliberately delayed approval of plaintiffs' application so as to allow a new zoning ordinance to be adopted under which it would no longer have authority to approve such revised survey.

42. The defendant Planning Board willfully, wrongfully and deliberately delayed such approval in an unlawful attempt to defeat plaintiffs' right to build the additional 264 bungalow units shown thereon.

44. By reason of such willful, wrongful and deliberate delay plaintiffs have a vested right to construct at least the 264 units shown on the revised survey.

46. The area devoted to the bungalow colony use is, as aforesaid, 136± acres, approximately ten acres of which were improved by the existing 123 units and a service infrastructure consisting of a clubhouse, outdoor pool, indoor pool and water system.

47. The aforesaid infrastructure was constructed with sufficient capacity to accomodate the eventual complete development of the entire 136± acre parcel devoted to the planned bungalow colony use

with the additional bungalows which would have been allowable at the time said infrastructure was provided.

50. On or about July 3, 1986 plaintiffs submitted to the defendant Building Inspector of the Town of Blooming Grove an application for a building permit to permit the construction of the first of a proposed additional 419 bungalows to be added to the existing 123 units at the bungalow colony.

59. The defendant Building Inspector has not issued or denied a building permit.

60. Plaintiffs have a right to the issuance of a building permit on the basis of plaintiffs' constitutionally vested rights to complete the development of its planned bungalow colony with the number of units allowed under the zoning ordinance prior to the adoption of the Zoning Ordinance of 1974.

Other allegations of the complaint are a recitation of the other documents accompanying the 1986 application and several paragraphs concerning the presence in the town records of the approved 136 acre map and its subsequent disappearance from those records.

The wrongful failure to grant petitioners' 1986 application, and not the equally wrongful denial of their 1973 application, was the basis of petitioners' case in the district court.

The third of the eight numbered demands for relief is as follows:

3. Declaring that plaintiffs have a valid vested right to improve their bungalow colony by the addi-

> tion of an additional 419 units in accordance with the provisions of the zoning ordinance in force prior to the adoption of the Zoning Ordinance of 1974 as shown on the map submitted with plaintiffs' application for a building permit and directing the defendant Building Inspector to issue to plaintiffs a permit for the first of said units applied for.

The Prior Appeal

In November 1988 the district court granted summary judgment to the respondents and dismissed the amended complaint. The petitioners appealed to the court of appeals and that court affirmed in part, reversed in part and remanded the case to the district court. In its opinion (Appendix C hereto) the court of appeals held:

> These circumstances and others create a genuine factual issue as to whether Greene's nonconforming bungalow colony use includes, as a matter of property right under New York law, the construction of the additional bungalow units.
>
> * * *
>
> The judgment of dismissal is affirmed as to all claims except the claim that the vested nonconforming use of Greene's land as a bungalow colony extends to the entire 136 acres previously approved for bungalow colony use. On that claim the judgment is reversed, and the case is remanded to the district court for further proceedings.

The Verdict

The case was tried before a jury in the district court. The pretrial order stipulated to by the parties (Appendix D

hereto) contained four of the eight numbered demands for relief referred to above, including the one numbered in the amended complaint as "3" and quoted above. The parties later stipulated to special jury verdicts, the first of which was:

> 1. Does the vested nonconforming use of plaintiffs' bungalow colony extend to the entire 136 acres previously approved for bungalow colony use?

The other special verdicts asked if the petitioner had been deprived of a constitutional right to build the bungalows in violation of 42 USC section 1983 and if so by which defendants and what was the amount of damages.

Respondents requested a charge to the jury that if it was able to agree on a verdict concerning some of the parties or some of the claims, it might return a verdict concerning only those parties or those claims.

After deliberation the jury returned a verdict in favor of the petitioners on the question of whether the vested nonconforming use extended to the entire 136 acres and in favor of the respondents on all other issues.

The Post Verdict Motions

Immediately after the verdict the respondents moved in open court for dismissal of the petitioners' pendent state claim upon the ground that the jury had found in favor of the respondents on all federal issues. Decision was reserved on that motion.

The clerk then entered a standard defendants' judgment, dismissing the complaint.

The petitioners then moved in writing to amend the judgment to include a declaration of their rights as found by the jury and an injunction vindicating them.

The district court denied the motion to dismiss the pendent state claim and entertained it in its discretion, directed that the rights of the petitioners as found by the jury be declared in the judgment, found that the necessity for a injunction had not been adequately shown and therefore denied all injunctive relief, and gave judgment to the respondents on the claim under 42 USC section 1983. (Appendix F hereto).

The Decision of the Court of Appeals

The court of appeals, in the opinion which petitioners seek to have reviewed, reversed so much of the district court judgment as declared the rights of the petitioners. (Appendix A hereto).

Initially the court of appeals assumes familiarity with its prior decision and states that it remanded for a trial of "the third cause of action". The court of appeals apparently assumes that the third demand for relief, which demands a declaratory judgment that the petitioners have a right to build an additional 419 units, refers back to the "third cause of action" although it is only in the "fourth cause of action" that the number 419 is alleged. It is clear that the prior remand from the court of appeals required a trial of the issue of whether the petitioners had a vested right to complete the 136 acre colony with 419 more units. Nothing is said in the earlier court of appeals decision about "causes of action".

The court of appeals went on to say, referring to the proceedings upon the return of the verdict:

> Although Greene had not pleaded separately a cause of action under New York state law, the district court and the parties apparently assumed at that point, without previous discussion of the subject, that there was in the case a pendent state law claim to declare that Greene's vested right extended to the entire parcel of land.

The court of appeals held that "no pendent state claim was ever before the district court" and that "the district court erred when it assumed that a state claim was pleaded in the amended complaint."

The court of appeals held that the finding of the petitioners' rights under state law by the jury was only one element of a claim under section 1983 and, in effect, held that the sole function of the jury was to find or not find all the elements of a single claim for relief under 42 USC section 1983.

The court of appeals did not discuss the pretrial order (which expressly amends the pleadings in accordance therewith), the defendants' requested jury instruction (concerning an ability of the jury to agree on some but not all claims) or why the parties agreed on special verdicts. Instead the court simply asserted that the petitioners had not raised a claim under state law until after the verdict, and the remand had been to try a single "cause of action".

The court of appeals distinguished its prior case, *Leather's Best, Inc. v. S. S. Mormaclynx*, 451 F.2d 800 (2d Cir 1971) which had held that a district court could hear an unpleaded state pendent claim on two grounds. First it said that since the Leather's Best case was an admiralty case the complaint should be construed more liberally than in the case at bar and second that the complaint in Leather's Best fairly appraised the defendant of the unpleaded claim and

therefore did not prejudice the defendant. Neither of these distinctions is persuasive. Leather's Best is a leading case frequently followed in non-admiralty cases. Since the court of appeals held that defendants apparently believed they were trying a pendent state claim for a declaratory judgment, they could hardly be prejudiced by not being fairly appraised that they were trying that claim.

Implicit in the reasoning of the court of appeals is the proposition that a pendent state claim is not pleaded unless it is separately stated and numbered in a section of the complaint set apart from the federal law claims. Based on this proposition the court of appeals reached the keystone of its opinion: that "the district court erred when it assumed that a state claim was pleaded in the amended complaint."

I.

The Court of Appeals created a conflict between the circuits where there had been agreement and it unsettled previously settled law.

This case cannot be regarded as a simple aberration in which a single property holder suffered an injustice outside the mainstream of the law. It calls into question the underpinnings of too many cases in what previously seemed well settled law.

Prior to the decision of the court of appeals in this matter the following proposition appeared well settled, "Pendent jurisdiction is not matter which must be pleaded since the court already has jurisdiction over the case." *Lykins v. Pointer Inc.*, 725 F2d 645, 647 (11th Cir. 1984); *Leather's Best, Inc. v. S. S. Mormaclynx*, 451 F2d 800, 817 footnote 10 (2d Cir. 1971); *Diaz v. United States*, 655 Fed. Supp. 411, 415 footnote 5 (E. D. Va. 1987). *DeBellas v. United States*, 542 F. Supp. 999, 1001 footnote 1 (SDNY 1982), *Maltais v. United States*, 439 F. Supp. 540, 543 (NDNY

1977) and *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 421 F. Supp. 237, 241 footnote 3 (D. N. J. 1976) also hold the same thing in different words.

The court of appeals has now said that this proposition is a peculiarity of admiralty pleading.

Lykins v. Pointer Inc., supra, Diaz v. United States, supra, DeBellas v. United States, supra, and *Maltais v. United States, supra,* all rely on *Leather's Best, Inc. v. Mormaclynx, supra,* as the primary case authority for the proposition. None is an admiralty case.

Not only has a conflict been created between the Second and Eleventh Circuit courts of appeals, previously in agreement with each other, but the Eleventh Circuit, after relying on a leading and scholarly opinion of the Second Circuit, is now told that the Second Circuit is repudiating the opinion as understood by the Eleventh Circuit.

It is, of course, true that the Leather's Best case has been cited for the proposition that if an admiralty claim is alleged in the complaint (whether or not it actually states a claim on which relief can be granted) pendent jurisdiction over a related similar claim under state law may be exercised, even if not expressly pleaded. *National Resources Trading, Inc. v. Trans Freight Lines,* 766 F. 2d 65, 68 (2d Cir. 1985): *Morse Electro Products Corp. v. S. S. Great Peace,* 437 F. Supp. 474, 482 footnote 12 (D NJ 1977). Neither of these cases says that the rule is not the same in non-admiralty cases.

Allowing the case sought to be reviewed to stand will put the Second Circuit in conflict with the Fifth Circuit on a point with much broader implications than the simple question of whether pendent jurisdiction must be pleaded. In *Joiner v. Diamond M. Drilling Co.*, 677 F. 2d 1035, 1040,

footnotes 10, 11 and 12 (5th Cir. 1982) it was pointed out that the merger of the rules of civil and admiralty procedure in 1966 meant that the same considerations would be applied in exercising pendent jurisdiction in admiralty and civil cases.

In *Bucky v. Sebo,* 208 F. 2d 304 (2d Cir. 1953) the complaint alleged patent infringement in violation of federal law. No mention was made in the pleadings, pre-trial order or trial of unfair competition. In that case the Second Circuit treated unfair competition in violation of state law as a pendent claim. The decision sought to be reviewed does not mention this case which should have been controlling.

The decision sought to be reviewed does suggest that even in the absence of an allegation of pendent jurisdiction, it can be exercised if the defendant is "fairly apprised" of it. It does not say what it means by this. It does point out, however, that when the jury returned its verdict the defendants' attorney believed there was a pendent state claim in the case. "Fairly apprised" must therefore mean something more than actual knowledge.

When the parties' attorneys agree to submit a claim to a jury, the wording of the claim is often the product of private discussion between the attorneys, pre-trial conferences, discussions with law clerks or magistrate judges or all of these. If the parties actually know as a result of these that there is a pendent state claim, there is no record for a court of appeals to search to find out exactly how the knowledge was imparted to the defendant. The "fairly apprised" exception in the opinion of the court of appeals does not make its error harmless to the body of case law it infects.

Furthermore, as will be shown, the opinion of the court of appeals refuses to follow the plain language of rules adopted by the Supreme Court and can cause great mischief with respect to the application of those rules if allowed to stand as a precedent.

II.

The lower federal courts should follow the unambiguous provisions of the federal rules of civil procedure as adopted by the Supreme Court according to the ordinary meaning of the words used in them with the aid of established rules of construction

All the allegations of fact making up the petitioners' pendent state claim and the demand for relief are contained in the amended complaint. The court of appeals in stating that the claim is not pleaded is imposing a requirement that the petitioners separately state and number each of their "causes of action". This requirement is not found in the Federal Rules of Civil Procedure but comes from the rules of pleading in the New York state courts N. Y. Civil Practice Law and Rules 3014. The court of appeals says, in effect, that failure to follow the rules and customs of New York pleading denies to the defendant fair notice of all the claims for relief.

Federal Rule of Civil Procedure 10(b) requires a separate statement only of claims founded on separate transactions or occurrences, and then only if separation facilitates clear presentation of the allegations. Technical forms of pleading are not required. Rule 8(e)(1). The basis of jurisdiction need not be alleged if the jurisdiction of the court has already been alleged and no new basis is required. Rule 8(a); *Lykins v. Pointer, supra; Leather's Best, Inc. v. S. S. Mormaclynx, supra.*

In 1934 Congress repealed by implication the Practice Conformity Act of 1872, 17 Stat. 197, and placed the power to make uniform rules of pleading in the federal courts in the hands of the United States Supreme Court. 28 U. S. C. 2072 (48 Stat. 1064). This eliminated the importation into federal practice of state rules of pleading. The applicable rule is Rule 10(b) which provides in part:

> "Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth."

The Rules do not contain other requirements of stating separate counts, claims or causes of action. Under the rule of construction *inclusio unius est exclusio alterius* the statement of a requirement to separate claims founded on separate transactions or occurrences excludes a requirement to state separately claims founded upon the same transaction and occurrence. Petitioners' claims that they have a right to complete their bungalow colony and that they have been deprived of their right to complete their bungalow colony in violation of the Fourteenth Amendment manifestly arise out of the same transaction.

The plain language of Rule 10(b) excludes a requirement that these two claims be stated in separate counts or causes of action. This is even more true in light of Rule 8 (e) (1) that no technical form of pleading is required.

In construing a rule made by itself the Supreme Court should apply the same methods it uses in construing statutes. In construing rules made by other rulemakers with adjudicatory functions the Supreme Court defers to the rulemaker's interpretation of the rules. Since the Federal

Rules of Civil Procedure are made by the Supreme Court deference is not relevant to their construction.

The Supreme Court is the final authority on the construction of rules and therefore should be the rule maker which is a paradigm for all rule makers in saying what it means and meaning what it says. It should be an example to all legislators in adopting rules capable of being construed solely on their plain language.

Similarly the Supreme Court should insist that its rules be strictly construed by the lower courts. Otherwise the Supreme Court is allowing the lower courts to imply that the final judge of the meaning of rules writes rules which mean something other than what they say in plain language construed according to established canons of construction.

It is clear that in construing statutes the courts cannot supply something they think the legislator should have added. A statute awarding attorneys' fees does not award the fees of experts unless the legislator says so. *West Virginia University Hospitals, Inc., v. Casey,* ____ US ____, 111 S. Ct. 1138, 113 L. Ed. 68 (1991). Similarly neither the court of appeals nor the Supreme Court should say that when an earlier Supreme Court required separate counts for certain separate claims it inadvertently omitted pendent state claims because the law of pendent claims was not fully developed or the Court was inadvertent or for some other similar reason.

Just as a prohibition of cruel and unusual punishment and of excessive fines is not a prohibition of all excessive punishments (because such a construction does violence to the language), a requirement that claims founded on separate transactions and occurrences be put in separate counts is not a similar requirement for claims founded on the same transactions and occurrences. *Cf. Harmelin v. Michigan,*

___ US ___, 111 S. Ct. 2680, 115 L. Ed. 836 (1991).

The test for the construction of the Federal Rules of Civil Procedure should be the same adopted for interpreting statutes and summarized in the dissent in *Chisom v. Roemer*, ___ US ___, 111 S. Ct. 2354, 2369, 115 L. Ed. 348 (1991): "first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not — and especially if a good reason for the ordinary meaning appears plain — we apply that ordinary meaning."

If the decision of the court of appeals stands uncorrected it will stand as a monument to the opposite proposition: that technical forms of pleadings, motions and procedures may be required in the federal courts where the plain language of the Federal Rules adopted by the Supreme Court excludes such requirements if that language is construed in its ordinary meaning, using established canons of construction.

III.

The petitioners were deprived of the fruits of a jury verdict in violation of the Seventh Amendment

The Seventh Amendment prohibits the retrial of a fact found by a jury other than according to the common law. Common law verdicts were for the plaintiff, for the defendant or special. Special verdicts were first authorized during the reign of Edward I. 13 Edw. c. 30. sec. 2., (Eng.). In a special verdict the jury finds the facts and prays the court for the appropriate judgment. 3 William Blackstone *377.

The Seventh Amendment preserves the substantive rights of the parties as at common law with respect to a jury trial. It does not prevent such purely procedural things as changing the names of procedures or the time for making motions, allowing two motions to be combined as one, or simplifying the reservation of rights. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 250-251 (1940). The Seventh Amendment applies to special verdicts. *International Terminal Operating Co., Inc. v. Nederl, Amerik Stoom v. Maats.*, 393 U.S. 74, 75 (1968).

At common law, the verdict was reduced to writing, attached to the roll and returned to court for a judgment to be entered if not suspended or arrested within four days after the start of the next term of the court. The judgment could be suspended for many reasons such as error, suprise or an excessive verdict. If it was suspended a new trial followed. On the other hand the judgment could be arrested only for a few very specific causes. In effect, if the judgment was arrested, the party who lost before the jury won the case. 3 William Blackstone *386-395.

What the court of appeals has done by directing a judgment for defendants after a jury has found against them is an arrest of a judgment on the basis of a preceived pleading defect. There was a well developed body of common law concerning such arrests of a judgment. First a judgment might be arrested if the declaration (complaint) varied so much from the basis of the court's subject matter jurisdiction that the court was without authority. For example in common law pleading if the writ and declaration were for different causes of action (a situation which cannot occur under the Federal Rules) judgment could be arrested. Second, judgment could be arrested if the case made out was not the same as that pleaded. Third, judgment could be arrested if the facts pleaded and proven were not actionable. On the other hand, judgment could not be arrested for

failure to include an essential allegation in the declaration. Before trial the defendant could demur to the declaration and it would be dismissed if any necessary allegation were missing. After the verdict, however, missing allegations were presumed to be supplied by the verdict. Inaccuracies and omissions in the pleadings of either party were not allowed to unravel the proceeding unless they were so essential that they demonstrated a lack of merit in that party's position or pleadings glaringly and completely at variance with that party's proof. 3 William Blackstone *391-393. In modern terms we would say that an objection to a pleading is not preserved if it is not made before trial and can be supplied by conforming the pleadings to the proof.

At common law, pleadings could be corrected, after verdict, by a repleader "unless it appears from the whole record that nothing material can possibly be pleaded in any shape whatsoever, and then a repleader would be fruitless." 3 William Blackstone *395.

It should also be noted that at common law in proceedings on appeal by writ of error, the courts overlooked those pleading errors which the pleader could have corrected. A number of statutes allowed a pleader to acknowledge a pleading error and by jeofaile correct it. 3 William Blackstone *406.

In brief the proposition that a plaintiff in error (or appellant) is entitled to a judgment contrary to a verdict because of a correctible pleading error of the appellee is contrary to common law. It therefore violates the Seventh Amendment to ignore a jury verdict on that basis.

Wherefore petitioners pray for a writ of certiorari.

Glen Cove, New York
October 7, 1991

CHARLES G. MILLS
Counsel of Record
for Petitioners

APPENDIX A—Opinion of the United States Court of Appeals for the Second Circuit Dated June 10, 1991.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1200, 1377—August Term, 1990

(Argued April 3, 1991 Decided June 10, 1991)

Docket Nos. 90-9025, 91-7043

MARVIN H. GREENE and LAKE ANNE REALTY CORP.,

Plaintiffs-Appellees, Cross-Appellants,

—against—

TOWN OF BLOOMING GROVE; SUPERVISOR AND TOWN BOARD OF THE TOWN OF BLOOMING GROVE; BUILDING INSPECTOR OF THE PLANNING BOARD OF THE TOWN OF BLOOMING GROVE; and BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Defendants-Appellants, Cross-Appellees.

Before:

KAUFMAN, WINTER and MINER,

Circuit Judges.

Appeal and cross-appeal from judgment entered in United States District Court for the Southern District of

New York (Kram, *J.*), following remand, dismissing in accordance with jury verdict civil rights claim for unconstitutional deprivation of right to expand bungalow colony but declaring in amendment to judgment that property right is vested in plaintiffs under state law.

Judgment reversed as to amended portion and affirmed in all other respects.

PATRICK J. MALONEY, New York, NY (D'Amato & Lynch, New York, NY, of counsel), *for Defendants-Appellants, Cross-Appellees.*

CHARLES G. MILLS, Melville, NY (Daren A. Rathkopf, Payne, Wood & Littlejohn, Melville, NY, of counsel), *for Plaintiffs-Appellees, Cross-Appellants.*

MINER, *Circuit Judge*:

Defendant-appellants/cross-appellees, Town of Blooming Grove and its Town Supervisor, Board, Building Inspector, Planning Board and Board of Zoning Appeals (collectively, "the Town") appeal from the amended portion of a judgment entered in the United States District Court for the Southern District of New York (Kram, *J.*). The action was brought under the provisions of 42 U.S.C. § 1983 (1988) ("section 1983") to redress the unconstitutional deprivation of a property right, a claim rejected in the jury verdict and the original judgment entered thereon. An amendment to the

judgment declared a property right under state law. The amendment was based on a jury finding, in answer to one of the questions posed by the court in a special verdict form, that under New York law plaintiff-appellee/cross-appellant Marvin H. Greene held a vested property right to develop a 136-acre parcel of land he owned in Blooming Grove in a manner that did not conform with current town zoning regulations. Greene and Lake Anne Realty Corporation (collectively, "Greene"), a company of which Greene is the sole shareholder and officer, cross-appeal from the portion of the judgment, entered upon the jury verdict, determining that the Town had not unconstitutionally deprived them of any property right.

Each of the eight claims (designated as "causes of action" in Greene's complaint) originally pleaded by Greene was premised on the contention that the Town's use of its zoning powers to deny his applications for building permits constituted a deprivation of property without due process under section 1983. The third cause of action was based on the Town's amendment to its zoning ordinance in 1974. That amendment foreclosed Greene from using the undeveloped portion of his land for the extension of his existing bungalow colony. Although it was not contested that Greene had a right of nonconforming use as to the 123 bungalow units already built, the issue dividing the parties was whether his right had vested with respect to the planned expansion of the resort over the entire 136-acre parcel. Thus, in the third cause of action, Greene sought a declaration that he had "a valid vested right to improve [the] bungalow colony by the addition of an additional 419 units in accordance with the provisions of the [Town] zoning ordinance in force prior to the adoption of the Zoning

Ordinance of 1974" and a direction that the Town issue him a permit to build the 419 units. The Town moved for summary judgment dismissing the complaint, which the district court granted. On appeal, we reversed and remanded as to that portion of the summary judgment dismissing Greene's third cause of action, finding a triable issue of fact as to "whether Greene's nonconforming bungalow colony use includes, as a matter of property right under New York law, the construction of the additional bungalow units." *Greene v. Blooming Grove*, 879 F.2d 1061, 1066 (2d Cir. 1989) ("*Greene I*").

On this appeal, we hold that the district court erred in exercising jurisdiction over an unpleaded pendent claim to grant declaratory relief to Greene on an issue of state law after the jury had found for the Town on the federal claim and after the district court had entered a judgment, pursuant to the jury's special verdict, dismissing the entire complaint. Accordingly, we reverse the portion of the judgment granting declaratory relief. We affirm the portion of the judgment entered upon the jury verdict in favor of the Town upon the section 1983 claim.

BACKGROUND

Familiarity with *Greene I*, in which we described in detail the dispute underlying this action, is presumed. Here, we recite only those facts relevant to this appeal.

In accordance with *Greene I*, a jury trial on the third cause of action was held in February, 1990. In this claim, Greene alleged that the Town's amendment to its zoning ordinance in 1974, under which his planned expansion of a bungalow colony resort over the entire

136-acre parcel became reclassified as an impermissible use of the land, amounted to an unconstitutional deprivation of a property right. Greene argued that his right to expand the bungalow colony by the construction of an additional 419 units had vested prior to the adoption of the 1974 amended ordinance.

With the consent of the parties, the district court submitted to the jury a special verdict form. The jury responded in the affirmative to the first question contained in the special verdict: "Does the vested nonconforming use of [Greene's] bungalow colony extend to the entire 136 acres previously approved for bungalow colony use?". However, the jury answered in the negative to the next question: "With respect to [Greene's] claim that the refusal of the Town . . . to permit the building of additional bungalow colony units on the undeveloped portion of [the] bungalow colony deprived [him] of a property right protected by the United States [C]onstitution in violation of [section 1983], [has] [Greene] proven this claim by a preponderance of the evidence?". Because of its answer to the second question, the jury did not respond to the third question, which concerned the amount of damages to be awarded plaintiffs upon a finding of liability.

Immediately after the jury announced its verdict, the Town orally moved in open court for "dismissal of the finding of the state law property right since the jury verdict finding no violation of [section 1983] . . . divested the [court of] subject matter jurisdiction over the state law claim." Although Greene had not pleaded separately a cause of action under New York state law, the district court and the parties apparently assumed at that point, without previous discussion of the subject, that

there was in the case a pendent state law claim to declare that Greene's vested right to a nonconforming use extended to the entire parcel of land. Judge Kram stated that she would withhold decision on the Town's motion while she considered it further.

On February 28, 1990, judgment in accordance with the jury verdict was entered in the district court dismissing the complaint; the judgment made no reference to any disposition of the Town's oral motion to dismiss the finding of a state law property right. On March 8, Greene moved under Fed. R. Civ. P. 59(e) and 60 to amend the judgment dismissing the complaint to include a declaration that Lake Anne held a vested right of nonconforming use for the entire 136 acres and to order that the Town issue a building permit to him. In response, the Town submitted a brief, in which it argued that no claim that the right existed had been asserted as a cause of action under state law. In an opinion dated October 22, 1990, the district court denied the Town's oral motion to dismiss Greene's "pendent claim" and granted declaratory relief to Greene, amending the judgment of dismissal to provide that "Marvin H. Greene has a valid vested right to improve the bungalow colony . . . by the construction of an additional 419 units" in conformance with the pre-1974 zoning ordinance. However, Judge Kram denied Greene's request for an order that the Town issue a building permit.

DISCUSSION

When a claim under section 1983 is based on an alleged deprivation of property in violation of the fourteenth amendment, a court must make

> the following inquiry: (a) whether a property right has been identified; (b) whether governmental action with respect to that property right amounts to a deprivation; and (c) whether the deprivation, if one be found, was visited upon the plaintiff without due process of law.

Fusco v. Connecticut, 815 F.2d 201, 205 (2d Cir.), *cert. denied*, 484 U.S. 849 (1987); *see also Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 327, 328 (1986). The extent and nature of a property right protected by the fourteenth amendment, as well as whether the right exists at all, are determined by reference to state law. *Cf. Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983); *Fusco*, 815 F.2d at 205-06. In this case, the determination of Greene's property right was a necessary prerequisite to a determination of the claim asserted under section 1983. It was not made in response to a separate and distinct pendent claim for which relief had been sought. *See Ruiz v. Estelle*, 679 F.2d 1115, 1157-59 (5th Cir.), *aff'd in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1042 (1983).

The exercise of pendent jurisdiction where a pendent claim is pleaded is within the discretion of the district court, and is "not [the] plaintiff's right." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *see also Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 627 (1974). If a pendent claim to declare a state property right had been pleaded, we would review under an abuse of discretion standard the district court's decision to exercise pendent jurisdiction by declaring Greene's vested right pursuant to New York law, consid-

ering factors of judicial economy, convenience and fairness to the parties, and whether the claims were so interrelated that Greene normally would be expected to try them together. *See Gibbs*, 383 U.S. at 725-26.

Here, however, no pendent state claim ever was before the district court. Greene never pleaded a state claim separately, never raised one as a discrete claim during the lengthy course of this litigation and only sought relief premised solely on state law after the district court already had entered judgment dismissing the action pursuant to the jury's verdict. In its Memorandum Opinion and Order granting the motion to amend the judgment, the district court correctly stated that Greene's "state claim," "if pleaded in the amended complaint and retained after remand in the pre-trial order, would be pendent to the § 1983 claim." However, the district court erred when it assumed that a state claim was pleaded in the amended complaint and proceeded to exercise jurisdiction over a pendent state claim that had been neither pleaded nor raised during the long course of the action.

A plaintiff may invoke federal jurisdiction over a state law claim appended to a federal claim where the pendent claim and federal claim share a common nucleus of operative fact. *Gibbs*, 383 U.S. at 725; *see, e.g., Federman v. Empire Fire & Marine Ins. Co.*, 597 F.2d 798, 810 (2d Cir. 1979); *Harris v. Steinem*, 571 F.2d 119, 122 n.7 (2d Cir. 1978). However, Greene never asserted a state claim in his amended complaint, and we find in the record before us no mention by Greene of any pendent state law claims during the proposal of jury charges, the formulation of the special verdict form to be submitted to the jury, or at the time the

jury rendered its verdict. In opening remarks, counsel for Greene described the action to the jury as one arising under section 1983 and involving an unconstitutional deprivation by the Town. The fact that the Town indicated after the verdict that it believed a pendent claim had been raised against it does not aid Greene, who simply failed to assert the claim. Thus, it seems clear that the finding on the state law issue merely established one of the elements of the section 1983 claim, and we hold that the district court's exercise of pendent jurisdiction was improper under the circumstances. *Cf. Haywood v. Ball*, 586 F.2d 996, 1000 (4th Cir. 1978) (plaintiff who pleaded claims under section 1983 and under common law of negligence entitled to relief based on jury's verdict for him on pendent claim, notwithstanding jury's verdict for defendants on federal claim).

Greene argued in his post-trial motion (but failed to argue on appeal) that he had met the requirements for asserting a pendent state claim, even though unpleaded, citing *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 809 (2d Cir. 1971). In *Leather's Best*, a shipper was awarded damages in an action asserted under the Carriage of Goods by Sea Act ("COGSA") against the owner of the pier from which the shipper's goods were stolen and against the carrier which had delivered the goods to the pier. *Id.* at 807-08. Addressing the issue of jurisdiction *sua sponte*, this Court held that, even though the shipper pleaded the action in admiralty and the pier owner was not susceptible to a suit in admiralty, the district court had power to hear the unpleaded claim as an exercise of its pendent jurisdiction because "[t]he heart of the shipper's complaint [under COGSA] is that the loss of the [goods] was the result of the negligence of [the pier owner]." *Id.* at 808.

Although the court in *Leather's Best* eschewed "an 'unnecessarily grudging' approach to the question of power to hear the pendent claim" and stated that, under *Gibbs*, the analysis should "focus[ ] upon the relationship between the facts underlying the state and federal claims," *id.* at 809, *Leather's Best* is distinguishable from this case. There, the action was grounded in admiralty, in which "[p]leadings . . . have traditionally been read with liberality." *Id.* at 808. Moreover, the federal claim pleaded in the shipper's complaint and the unpleaded pendent claim were based on the same theory (*i.e.*, negligence); therefore, the shipper's presentation at trial of his case fairly apprised the pier owner of the unpleaded claim against him, and the pier owner was not prejudiced by this Court's decision to allow the shipper to proceed with the pendent claim on remand.

By contrast, the Town here was not fairly apprised of an unpleaded pendent claim by Greene's introduction of evidence supporting his contention that he held a nonconforming use to build an additional 419 bungalow units, because Greene was required to present such evidence in order to maintain his only pleaded claim. *Cf. Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 680-81 (2d Cir. 1985) (post-trial amendment of pleadings to add claim to conform with evidence not permitted unless unpleaded claim actually has been tried and opposing party has opportunity to defend against it). Had the Town known that Greene sought a declaration that his right of nonconforming use extended across the entire parcel of land as a claim independent of the section 1983 claim, it might have undertaken its defense in a different manner. However, the combination of the pleadings, arguments and the evidence offered at trial gave notice to the Town that it was required to defend

only a section 1983 claim for unconstitutional deprivation of a property right. It was this deprivation that was at the "heart" of Greene's complaint.

Our decision here can hardly be said to represent an overly formalistic approach to the assertion of claims. Not only did Greene fail to assert a pendent claim in his pleadings but, as discussed above, he attempted to do so only after judgment had been entered in the litigation. However, the jury's finding that the vested right extended to the entire parcel of land may yet prove to be of some benefit to Greene. The finding may have collateral estoppel effect if Greene seeks in state court to compel the issuance of a building permit. *Compare Neulist v. Nassau County*, 108 Misc.2d 160, 166-69, 437 N.Y.S.2d 239, 245-46 (Sup. Ct. 1981) (element of action for malicious prosecution collaterally barred from being relitigated after identical issue determined as part of section 1983 action in federal court), *aff'd*, 88 A.D.2d 587, 450 N.Y.S.2d 762 (2d Dep't 1982), *appeal denied*, 57 N.Y.2d 606, 441 N.E.2d 568, 455 N.Y.S.2d 1025 (1982) *with Brizse v. Lisman*, 231 N.Y. 205, 207-08, 131 N.E. 891, 891 (1921) (special verdict findings by jury for plaintiff in case where ultimate verdict rendered in favor of defendants held to have no collateral estoppel effect against defendants in any future action brought by plaintiff against defendants).

Since we have concluded that the district court abused its discretion in exercising pendent jurisdiction over the state law component of the section 1983 claim, we hold that it was error to amend the judgment under Fed. R. Civ. P. 59(e) and 60. The "narrow aim" of Rule 59(e) is "'to mak[e] clear that the district court possesses the power' to rectify its own mistakes in the period immedi-

ately following the entry of judgment." *White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 450 (1982) (footnote omitted). Similarly, Rule 60 permits amendment where the original judgment contains clerical error, and was premised on "mistake, inadvertence, surprise or excusable neglect." *See Morgan Guaranty Trust Co. v. Third Nat'l Bank of Hampden Cty.*, 545 F.2d 758, 760 (1st Cir. 1976). However, neither rule is applicable here. Once the jury had found the Town not liable under section 1983, which was the only claim tried, the district court's only remaining task was the entry of judgment dismissing the claim. *Cf. Continental Cas. Co. v. Howard*, 775 F.2d 876, 883 (7th Cir. 1985) ("[a] motion to amend the judgment . . . is appropriate if the court in the original judgment has failed to give relief on a claim on which it has found that the party is entitled to relief."), *cert. denied*, 475 U.S. 1122 (1986).

We have examined Greene's remaining contentions and find them to be without merit.

CONCLUSION

We affirm the portion of the amended judgment that dismisses the claim under 42 U.S.C. § 1983 and reverse the portion of the amended judgment that declares a vested right in the extension of the nonconforming use of the undeveloped portion of the bungalow colony property.

720—6-12-91 • USCA—80004 FY90

RECORD PRESS, INC., 157 Chambers St., N.Y. 10007 (212) 619-4949

APPENDIX B—Memorandum Opinion and Order of the United States District Court, Southern District of New York, Dated November 18, 1988.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MARVIN H. GREENE and LAKE ANNE REALTY CORP.,

Plaintiffs,

against

TOWN OF BLOOMING GROVE, SUPERVISOR and TOWN BOARD OF THE TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE and BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Defendants.

87 Civ. 0069 (SWK)

SHIRLEY WOHL KRAM, U.S.D.J.

This action is brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The plaintiffs, Marvin H. Greene and the Lake Anne Realty Corp. ("the plaintiffs"), unsuccessfully applied for approval from the Town of Blooming Grove to expand or renovate certain bungalow colonies. Lake Anne Realty Corp. is wholly owned by Marvin H.

Greene. The plaintiffs complain that: the Town of Blooming Grove, its Planning Board, Zoning Appeals Board and certain Town officials ("the defendants") are pursuing a course of conduct that is (1) deliberately and purposefully depriving plaintiffs of their property without the due process of law and which deprives plaintiffs of the equal protection of the law in violation of the fourteenth amendment of the Constitution of the United States ("Constitution"); and (2) that this action constitutes a taking of plaintiffs' property without just compensation in violation of the fifth amendment of the Constitution.

The Town of Blooming Grove, and its Supervisor, Building Inspector, Town Board, Planning Board and the Zoning Board of Appeals ("the defendants") move to dismiss the complaint pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure on the grounds that the plaintiffs have failed to state a claim upon which relief can be granted, and that the action is barred by the applicable statute of limitations. Alternatively, the defendants move for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. Plaintiffs cross-move for summary judgment on their declaratory judgment claim asserting a "vested right" to improve their bungalow colony. For the reasons set forth below the Court grants defendants' motion for summary judgment dismissing the complaint and denies plaintiffs' cross-motion for summary judgment.

BACKGROUND

The material facts, which are taken from both the amended complaint and the local rule 3(g) statements, are not in dispute. Plaintiffs own several parcels of real property within the Town of Blooming Grove, one which is the 136± acre parcel at issue in this case. Plaintiffs own and operate a bungalow colony on approximately 10 acres of this parcel pursuant to a bungalow colony map approved by the Town of Blooming Grove on October 28, 1960. *See*

Amended Complaint, Exhibit A. This 10± acre site is improved by 123 bungalow units and a service infrastructure consisting of a clubhouse, outdoor pool, indoor pool and water supply system.

On October 17, 1973, plaintiffs submitted a map to the defendant Planning Board as part of their application for approval to construct an additional 264 bungalow units on the remaining 126± acres. On January 9, 1974, the defendant Planning Board denied plaintiffs' application. Denial was based upon the Planning Board's contention that plaintiffs' application fell within the reach of a Town moratorium on the issuance of building permits for the "construction of single family dwellings in subdivisions and multiple dwellings." Blooming Grove's Local Law No. 1, 1972. Plaintiffs then commenced an Article 78 proceeding in Supreme Court, Rockland County, to direct the Planning Board to approve the survey map, or alternatively, to direct the Town Clerk to issue a certificate approving the map. The state court found that the application submitted by plaintiffs was not subject to the moratorium and directed the Planning Board to consider the acceptability of said map in conformity with the applicable zoning provisions. *See* Plaintiffs' Amended Complaint Exhibit B.

On August 8, 1974, the Planning Board and the Town Clerk appealed the state court decision to the Appellate Division, Second Department. On October 7, 1974, during the course of that appeal, the Town of Blooming Grove repealed the 1953 Zoning Ordinance and enacted the Zoning Ordinance of 1974, which eliminated bungalow colonies as a permitted use. Based upon the enactment of the Zoning Ordinance of 1974, the Appellate Division dismissed the appeal on March 25, 1975 as moot.

The plaintiffs, on May 21, 1975, appeared before the Planning Board and re-submitted their plan. Plaintiffs were informed at that meeting, and then were notified by letter dated May 27, 1975, that the Planning Board would not

consider the acceptability of the survey map due to the enactment of the Zoning Law of 1974. Plaintiffs then sought unsuccessfully in state supreme court to hold the Planning Board in contempt for failing to comply with the earlier state court determination that the plaintiffs were not subject to the moratorium and that the Board should consider the acceptability of the application under the then effective Zoning Law of 1953. In this second state action, the state supreme court found that the Planning Board could not be held in contempt for refusal to consider an application under the provisions of a zoning ordinance that no longer existed. *See* Plaintiffs' Amended Complaint Exhibit C.

Also in October, 1974, the Town of Blooming Grove established boundaries for the zones created by the Zoning Ordinance of 1974. This Zoning Map places land, including a 35± acre parcel of the plaintiffs' land, in an R-80 conservation residence district. An R-80 district must have a minimum lot area of 80,000 square feet, rather than the 30,000 square feet mandated by an R-30 residence district. Plaintiffs' land is not the only land zoned in this more restrictive district. The Planning Board map shows in excess of a dozen areas, including plaintiffs' land, that are now located within the R-80 zone.

Subsequently, in November, 1983, plaintiffs applied to the building inspector for a building permit to enclose porches of the bungalow units located in three single story buildings. By letter dated November 21, 1983, the building inspector denied plaintiffs application. Plaintiffs appealed to the Zoning Board of Appeals which also denied their request.

On or about August 11, 1986, plaintiffs applied to the building inspector for a building permit to allow the installation of certain plumbing fixtures in a building once allegedly used as a hotel. The application for the plumbing fixtures listed the intended use of the buildings as "Apts,

Rooms, Luncheonette, [and] Cocktail Lounge". Although this permit was issued to the plaintiffs, the building inspector omitted the words "luncheonette" and "cocktail lounge" and left "apts" and "rooms".

On or about October 24, 1985, plaintiff Marvin H. Greene entered into a conditional contract with the Estate of Carl Bartels to purchase a parcel of real property situated within the Town of Blooming Grove. This contract was contingent upon the Planning Board's approval of two applications (1) granting a subdivision of that parcel from the other property of the Estate of Carl Bartels, and (2) upon the Planning Board's approval of access to said parcel over an existing improved road known as Evergreen Lane. The Planning Board refuses to allow Evergreen Lane to be used for such an access.

On July 3, 1986, plaintiffs submitted to the Building Inspector an application for a building permit for the construction of the first of a proposed additional 419 bungalow units to be added to the existing 123 units. The permit has not been issued or denied to this Court's knowledge.

On October 22, 1986, the Building Inspector issued a criminal summons to Marvin H. Greene and filed five criminal informations for alleged violations of the New York State Uniform Fire Prevention and Building Code and the Municipal Code of the Town of Blooming Grove for operating a dump in a residential zone.

DISCUSSION

Standards for Summary Judgment

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In testing whether the movant has met this

burden, the Court must resolve all ambiguities against the movant. *Lopez, Inc. v. S.B. Thomas,* 831 F.2d 1184, 1187 (2d Cir. 1987) (citing *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962)).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress and Co.,* 398 U.S. 144, 157 (1970). The movant may discharge this burden by demonstrating to the Court that there is an absence of evidence to support the non-moving party's case on which that party would have the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) . The moving party may rely on the evidence in the record to point out the absence of genuine issues of material fact. *Celotex, supra,* 477 U.S. at 323. The moving party does not have the burden of providing evidence to negate the non-moving party's claims. *Id.* The non-moving party then has the burden of coming forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). Speculation, conclusory allegations and mere denials are not enough to raise genuine issues of fact. To avoid summary judgment, enough evidence must favor the non-moving party's case such that a jury could return a verdict in its favor. *See Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986) (interpreting the "genuineness" requirement).

Validity of R-80 Districts

The plaintiffs complain that the inclusion of 35± acres of their land within an R-80 zoning district violates 42 U.S.C. §1983[1] by depriving them of due process and equal protection of the law in violation of the fourteenth amendment. The defendants argue that this claim is barred by the applicable statute of limitations, and therefore, must be dismissed.

Since 42 U.S.C. § 1983 does not contain an applicable period of limitations, federal courts apply the law of the state in which the action is brought to determine the limitations period. *Wilson v. Garcia,* 471 U.S. 261, 266 (1985). Since deprivations of civil rights are considered personal injuries, *id.* at 276, New York's limitations period for personal injuries, which is three years, applies to actions brought under 42 U.S.C. § 1983. *See* N.Y. C.P.L.R. § 214. Tolling periods are also borrowed from state law. *Cullen v. Margiotta,* 811 F.2d 698 (2d Cir. 1987) The Supreme Court has stated that "federal courts are not only obligated to apply the analogous New York statute of limitations . . . to federal constitutional claims, but also to apply the New York rule for tolling that statute of limitations." *Chardon v. Fumero Soto,* 462 U.S. 650, 656-57 (1983) (citing *Board of Regents v. Tomano,* 466 U.S. 478, 483 (1980)). Since the "length of the limitations period is interrelated with provisions regarding tolling, the practice of borrowing state statutes of limitations logically includes rules of tolling." *Id.* at 657. The *Chardon* Court concluded "that no federal

---

[1]42 U.S.C. § 1983 (1988) states in pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured an action at law, suit in equity, or other proper proceeding for redress . . .

policy, deterrence, compensation, uniformity, or federalism was offended by the application of state tolling rules." *Id.* at 657.

While New York law is applied to determine the applicable limitations period and its tolling, if at all, federal law governs to ascertain when a cause of action under § 1983 accrues. *Leonhard v. U.S.*, 633 F.2d 599, 613 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); *Kaiser v. Cahn*, 510 F.2d 282, 284 (2d Cir. 1974). An action accrues when the plaintiff knows, or has reason to know, of the injury that is the basis of the action. *Barrett v. United States*, 689 F.2d 324, 333 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983); *Singleton v. City of New York*, 632 F. 2d 185, 191 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981); *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975).

The accrual of the § 1983 cause of action occurred when the plaintiff had reason to know of the R-80 density limitation on the development of his land, which occurred on October 7, 1974, at which time the Town of Blooming Grove adopted the zoning map establishing the districts for the zones created by the Zoning Ordinance of 1974. Thus, the three year statute of limitations period should have ended on October 7, 1977. Plaintiff, however, argues that the limitations period for his § 1983 action should be tolled. If the ordinance is constitutionally invalid, it would constitute the equivalent of a continuing invasion of plaintiffs' property rights akin to a continuing trespass—a situation in which a new cause of action arises in plaintiffs favor against the city each day. *MacEwen v. City of New Rochelle*, 149 Misc. 251, 267 N.Y.S. 36 (1933) (statute of limitations was not a bar in an action for declaratory judgment where plaintiff alleged that a zoning ordinance was invalid because of its effect on plaintiff's land). Thus, the statute of limitations does not bar a meritorious attack on a zoning ordinance. *Amerada Hess Corporation v. Acampora*, 109 A.D.2d 719, 486 N.Y.S.2d 38, 41 (2d Dept. 1985) (six year

limitations period did not a bar constitutional attack of zoning ordinance, where plaintiff commenced action nine years after accrual). Therefore, this Court must determine the constitutional validity of the zoning districts established by the 1974 ordinance.

The rational basis test guides this Court's equal protection analysis of the zoning ordinance. *Horizon Concepts Inc. v. City of Balch Springs,* 789 F.2d 1165, 1167 (5th Cir. 1986). Under the rational basis test, the zoning ordinance will be upheld if any facts, either known or reasonably assumed, demonstrate that the ordinance has some rational relationship to any legitimate government purpose. *U.S. v. Carolene Products,* 304 U.S. 144, 154 (1938). In order to classify as a legitimate government purpose the ordinance here must be justifiable as an exercise of the police power for the advancement of the public welfare. *Euclid v. Ambler Co.,* 272 U.S. 365, 387 (1926). In addition, as an exercise of the police power, a zoning ordinance is presumed to be constitutionally valid. *Goldblatt v. Hemstead,* 369 U.S. 590, 596 (1962). Under this equal protection analysis, courts have generally invalidated only those ordinances shown to be arbitrary and capricious. *Horizon Concepts, supra,* 789 F.2d at 1167; *Euclid, supra,* 272 U.S. at 395. This Court finds that the R-80 districts under review are neither arbitrary, nor capricious.

Plaintiffs allege discrimination by the Zoning Board through the inclusion of 35± acres of their property in the restrictive R-80 Zone. The plaintiff Greene states that as the R-80 zone's boundary line enters his property it is "sharply diverted . . . in such a way to include within the more restrictive R-80 district a portion of plaintiffs' property which would otherwise have been included within the R-30 district if the direction of the dividing line had not been so inexplicably diverted." *See* Amended Complaint ¶¶ 17, 19. Plaintiff, however, also admits in his affidavit that the adjoining landowner's property is also included in the

R-80 Zone. *See* Affidavit of Marvin H. Greene ¶3 ("Greene Affidavit"). Moreover, defendants state that an excess of a dozen areas are zoned R-80, which belies the presence of discriminatory intent. *See* Reply Affidavit of Defendant's Attorney Patrick J. Maloney ¶6 ("Maloney Affidavit").

The Zoning Board adopted differential zoning between the R-80 and R-30 districts based upon the topography of the land because, in essence, rougher and higher elevated terrain requires a larger lot to adequately support a dwelling. Thus, the 80,000 square foot minimum lot area is rationally related to the need to prevent overcrowding and to adequately support a single family dwelling. In other words, the Town Planning Board acted to protect the Town's residents when it regulated the density of development in areas where the land is less suitable for development. As these objectives are within the police power and reasonable, this Court finds that the zoning restrictions of the Town of Blooming Grove municipal code are not arbitrary or capricious, and therefore, do not violate the equal protection clause.

Plaintiffs also allege that their due process rights were violated. "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Board of Regents v. Roth,* 408 U.S. 564, 576 (1972). To have a constitutionally protected property interest in a benefit, "a person must have more than an abstract need or desire for it. . . He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577. Even assuming a cognizable right protected under due process exists, the fundamental requirements of due process, which are that the plaintiffs receive adequate notice and a meaningful opportunity to be heard, were satisfied in the present case. *Dean Tarry Corp. v. Friedlander,* 650 F. Supp. 1544, 1551 (S.D.N.Y. 1987), *aff'd,* 826 F.2d 210 (2d Cir. 1987). *See also Parratt v. Taylor,* 451 U.S. 527, 539 (1981). Both the plaintiff and his

representatives had notice of, and were in attendance at, the Town meetings when these restrictions were discussed and passed. Furthermore, plaintiffs had an opportunity to submit their objections and arguments to the Planning Board. The plaintiffs also have not produced any evidence that might show that the meetings before the Planning Board were unfair. Moreover, no specific claim for a deprivation of procedural due process and, indeed, no procedural irregularity appears from the face of the pleadings. *Dean Tarry, supra,* 650 F. Supp. at 1551. Consequently, plaintiffs' rights under the due process clause were not violated by the enactment of R-80 districts.

Denial of Plaintiffs' Applications for Development Under the Zoning Ordinance of 1974

1. Vested Right to Build 419 Bungalow Units

Plaintiffs allege that they have a vested right to expand their vested nonconforming use and build 419 bungalow units on the 126± vacant acres in order to devote the entire 136± acre parcel to bungalow colony use. The alleged basis for such an expansion of the vested nonconforming use is the plaintiffs' submission of a map in 1960 of the entire 136± acre parcel, which detailed the approved ten acre bungalow development. In 1986, plaintiffs applied for a permit to develop the remaining 126± acres, which to this Court's knowledge, has neither been granted nor denied. Plaintiffs seek a declaratory judgment that they are entitled to build an additional 419 units.

Under the law of New York, a landowner has no vested interest in the existing classification of his property. *Ellentuck v. Klein,* 570 F.2d 414, 429 (2d Cir. 1978). However, a zoning ordinance cannot prohibit an existing use to which the property was devoted at the time of the ordinance's enactment. *Syracuse Aggregate Corp. v. Weise,* 72 A.D.2d 254, 424 N.Y.S.2d 556, 560 (4th Dept. 1980), *aff'd,* 51 N.Y.2d 278, 434 N.Y.S.2d 150, 153, 414 N.E.2d 651

(1980). A vested nonconforming use is one that lawfully existed prior to the enactment of a zoning ordinance that prohibits such use, and which is continuously maintained after the zoning changes, even though such a use does not comply with use restrictions of the new ordinance. *City of New York v. Bilynn Realty Corp.*, 118 A.D.2d 511, 499 N.Y.S.2d 1011, 1014 (1st Dept. 1986) (lower court's grant of a vested nonconforming use reversed where defendant's only established prior uses that could be deemed vested were medical and dental offices and not a realty office and grocery store). To establish a right to a vested nonconforming use "the person claiming the right must demonstrate that the property was indeed used for the nonconforming purpose, as distinguished from a mere contemplated use, at the time the zoning ordinance became effective." *Syracuse, supra,* 434 N.Y.S.2d at 153. Not every inch of the property need be embraced by the nonconforming use in order to entitle the entire parcel to exemption from a subsequent, restrictive ordinance; however, use of a limited portion of the premises will not necessarily serve to confer vested nonconforming use status on the entire parcel. *Id.* at 153.

The standard this Court must apply to decide whether a nonconforming use extends to the whole tract or only to a part thereof is "whether the nature of the incipient nonconforming use, in the light of the character and adaptability to such use of the entire parcel, manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance." *Syracuse, supra,* 434 N.Y.S.2d at 153. *See also Marra v. State of New York,* 61 A.D.2d 38, 401 N.Y.S.2d 349, 351 (4th Dept. 1978). The mere intention, hope, or expectation that the operation would someday extend to claimants' entire land holdings is insufficient to expand a nonconforming use. *Marra, supra,* 401 N.Y.S.2d at 351. New York courts have held that the exception for vested nonconforming uses should be limited, and that the goal is ultimately to phase out these uses. *Syracuse,*

supra, 434 N.Y.S.2d at 153. Moreover, even though the zoning authorities may not prohibit a prior nonconforming use, they may adopt regulations that restrict the right of the property owner to extend such use, enlarge, rebuild, or to make other alterations to the structures on the property. *Fairmeadows Mobile Village Inc., v. Shaw,* 16 A.D.2d 137, 226 N.Y.S.2d 565, 569 (4th Dept. 1962).

In *Marra,* plaintiffs owned four parcels of land. Parcel 2A was used since 1932 as an automobile salvage business which later, by a zoning ordinance adopted in 1956, became a vested nonconforming use. *Id.* at 350. Plaintiff's land in *Marra* was appropriated by the State of New York, *id.,* and the New York Court of Claims awarded plaintiff a premium for loss of the potential use of parcel 2B as an automobile junkyard. *Id.* at 351. The State of New York appealed contending that the vested nonconforming use of Parcel 2A could not be extended to 2B, and therefore, the premium attributable to Parcel 2B should not have been awarded. *Id.* at 351. The *Marra* court found that the plaintiff had never substantially used parcel 2B as part of the junkyard business between 1932 and the enactment of the zoning ordinance in 1956. *Id.* at 351. Absent substantial use of that parcel as a junkyard prior to the zoning ordinance that prohibited such use, the Court reversed the lower court and denied extension of the vested nonconforming use of parcel 2A to 2B. *Id.* at 351-52.

In *Dolomite Products v. Kirks,* 23 A.D.2d 339, 260 N.Y.S.2d 918, 921 (4th Dept. 1965), *aff'd,* 19 N.Y.2d 739, 279 N.Y.S.2d 192 (1967), *cert. denied,* 389 U.S. 214 (1967), the New York Court of Appeals also refused to expand a vested nonconforming use. In *Dolomite,* plaintiffs owned three parcels: A, B and C. Parcel A was operated as a quarry. Parcels B and C were used as a farm/nursery. *Id.* at 919. The town in that case denied plaintiffs' application for a permit to excavate and blast on parcels B and C as plaintiffs did on parcel A. *Id.* at 919. Plaintiffs argued that

the reason they purchased parcels B and C was to work said parcels in the same manner as plaintiffs operated parcel A. *Id.* at 921. The court found that it was critical that no quarry operations had been carried out on either parcel B or C since their acquisition approximately forty years ago. *Id.* at 921. The *Dolomite* court reasoned that "it was not consonant with progressive or contemporary planning to permit one to purchase a large parcel of real property, work thirty acres of it and do nothing for forty years with the balance of 47 acres, but nevertheless, have the right sometime in the distant future to make a nonconforming use of it in violation of an ordinance prohibiting it." *Id.* at 921. In the present action, expanding plaintiffs vested nonconforming use to the entire 136± acre parcel would similarly contradict the policies of progressive or contemporary planning.

New York courts have extended vested nonconforming uses to the whole property where either the whole parcel was substantially dedicated to the nonconforming use or substantial expenditures in preparation of such use were made. *See Syracuse, supra,* 424 N.Y.S.2d at 559-60; *Telimar Homes, Inc. v. Miller,* 14 A.D.2d 586, 218 N.Y.S.2d 175, 177 (2nd Dept. 1961), *appeal denied,* 14 A.D.2d 701, 219 N.Y.S.2d 937 (1961). In *Syracuse,* plaintiffs successfully extended their nonconforming use to their whole parcel because the surface of a portion of the land was stripped and different types of materials were removed from different portions of the entire property. 424 N.Y.S.2d at 559. The Court of Appeals found that it would be impractical to put the land to any other use because of the characteristics of its altered surface and the small size of its remaining open areas. *Id.* at 560. Similarly, in *Telimar Homes, supra,* a vested nonconforming use was extended to remaining parcels because the court found that substantial construction, partial development, and substantial expenditures attributable to the remaining parcels existed prior to the zoning amendment. 218 N.Y.S.2d at 176-77. The factor deter-

minative of extensions of vested nonconforming uses in *Syracuse* and *Telimar,* which does not exist in the present action, is that various structures and other improvements in connection with the business had actually been, or were being, built on the entire parcel at the time the zoning law changed. *Id.* at 560.

This Court does not find that plaintiffs have shown substantial expenditures, partial development, substantial construction or that the whole parcel was dedicated to the nonconforming use. Therefore, this Court cannot extend the vested nonconforming use as a bungalow colony to plaintiffs' undeveloped 126± acres. The mere existence of the map submitted to the town in 1960, which only evidenced approval for a 10± acre bungalow development, does not vest any rights to develop the entire parcel. More importantly, plaintiffs had not made substantial expenditures, prior to the zoning change, on the 126± acres in preparation for its development as a bungalow colony. Plaintiffs' only expenditure allegedly attributable to this 126± acre parcel is the amount spent in building an infrastructure that can accommodate more guests than is the capacity of the current bungalows. The infrastructure, however, which serves the current bungalow units is located within the developed 10± acre parcel that constitutes a vested nonconforming use. This Court concludes that the 126± acre parcel does not represent a vested right to be developed as a bungalow colony. Instead, it must be developed in accordance with the zoning ordinances presently in effect.

2. Vested Right to Build 264 Bungalow Units

Alternatively, plaintiffs allege that they have a vested right to construct an additional 264 bungalow units on the remaining 126± acre parcel by virtue of the alleged dilatory tactics of defendants in delaying consideration of plaintiffs' development plan until the Town could enact the zoning ordinance of 1974. After the New York State Supreme

Court directed the Planning Board to review plaintiffs' plans, the plaintiffs argue that the Planning Board wrongfully delayed consideration of their application by appealing the state court decision until a new zoning ordinance that prohibited bungalow colonies became effective.

Plaintiffs' cause of action accrued, at the latest, on September 23, 1975, when the State Supreme Court denied their action to hold defendants in contempt for failure to consider plaintiffs' application under the 1953 zoning ordinance to build 264 bungalow units. Since plaintiffs' action is for a declaratory judgment, some question exists as to which limitations period applies, that for personal injuries, which applies to § 1983 actions generally, *see* N.Y. C.P.L.R. § 214, or the six year period that applies to declaratory judgments. *See* N.Y. C.P.L.R. § 213. Applying the six year statute of limitations for declaratory judgments, any action, to survive, must have been commenced by September 23, 1981. Since plaintiffs commenced this proceeding on January 6, 1987, by filing the complaint with this Court and serving the summons and notice, the cause of action for a declaratory judgment as to an additional 264 units is barred under either statute of limitations.[2]

3. Building Permit to Install Plumbing Fixtures

On August 11, 1986, plaintiffs applied to the building inspector for a permit to install plumbing fixtures in a building located on the 10± developed acres. Plaintiffs, in their application for the building permit, described the building as "Apts, Rooms, Luncheonette, [and] Cocktail Lounge," but the building inspector crossed out the words "Luncheonette" and "Cocktail Lounge". The plaintiffs now

---

[2]Plaintiffs allege that the statute of limitations has not run because defendants are "pursing a course of conduct that is still continuing". *See* Amended Complaint ¶¶ 8, 9. Plaintiffs however, have not specified the acts that constitute such course of conduct, and this Court finds no such continuing acts that would justify tolling the statute of limitations.

allege a vested right to use the building as a hotel and contend that the building inspector maliciously altered the application to deny the building permit for luncheonette or cocktail lounge use. The defendants, however, claim that the plaintiffs abandoned the use of the cocktail lounge and luncheonette, and consequently, have lost the vested nonconforming right to such uses. Under the law of New York, "abandonment of a [vested] nonconforming use may be found from a manifestation of intent to discontinue the prior nonconforming use coupled with a clear discontinuance." *Ellentuck, supra,* 570 F.2d at 418 n.8.(citing *Village of Spencerport v. Webaco Oil Company,* 33 A.D.2d 634, 305 N.Y.S. 2d 20 (4th Dept 1969)). In *Carroll v. Ingram,* 59 A.D.2d 85, 397 N.Y.S.2d 220, 222 (3rd Dept. 1977), the court detailed factors that evidence the intent to abandon a property's use. These factors, include the permitted deterioration of the property, the failure to guard it or protect it from vandals and the purely voluntary discontinuation of its use over an extended period of time. *Id.* at 222. However, the *Carroll* court denied the plaintiffs prior nonconforming use status for a race track because the race track was not in continuous operation at the time when the ordinance that prohibited it was enacted. *Id.* at 222.

Before issuing the permit in this case, the building inspector requested proof of nonabandonment of the apartments, cocktail lounge and luncheonette. *See* Maloney Affidavit, Exhibit D. Since plaintiffs failed to produce proof of nonabandonment of the cocktail lounge and luncheonette, and on the basis of an apparent abandonment, the building inspector properly deleted "cocktail lounge" and "luncheonette" from the permit. *See* Maloney Affidavit, Exhibit D. The plaintiffs had only produced evidence of nonabandonment of the apartments, in the form of a lease for one apartment for the preceding twenty four months. The other apartments in the building had remained vacant during this time period. *See* Maloney Affidavit, Exhibit D. On the basis of this lease, the building inspector issued a permit to

renovate all the apartments and rooms. *See* Maloney Affidavit, Exhibit D.

This Court finds that the following factors present a clearly established intent to abandon the property's use as a cocktail lounge and luncheonette. The plaintiffs have allowed their liquor license to lapse and have allowed deterioration of the physical structure. *See* Amended Complaint ¶¶ 87, 79. Furthermore, only one apartment was rented in the structure within the preceding twenty four months, suggesting also that the building was not operated as a hotel during that time span.

The defendants, the moving party, through its deposition of the building inspector have demonstrated that there is an absence of evidence to support the plaintiffs case on the issue of abandonment. Since the plaintiffs would have the burden at trial to prove that the building's use as a hotel has not been abandoned, plaintiffs also have the burden at the summary judgment stage to come forward with sufficient evidence to demonstrate that "abandonment" remains a genuine issue. *Celotex, supra,* 477 U.S. at 323. The plaintiffs', however, have done nothing more than state in conclusory allegations that the building's use as a hotel has been continual, and thus, the Court concludes that there are no genuine issues on this point. *Matsushita, supra,* 475 U.S. at 586. (non-movant must be specific because simply showing "metaphysical" doubt as to material facts does not suffice).

It is well settled that a building inspector is required to deny a permit for development that both contradicts current zoning laws and does not represent a current vested nonconforming use. *Parkview Associates v. City of New York,* 71 N.Y.2d 274, 281-282, 525 N.Y.S.2d 176, 177-78, 519 N.E.2d 1372 (1988), *reconsideration denied,* 71 N.Y.2d 995, 529 N.Y.S.2d 278, 524 N.E.2d 879 (1988), *cert. denied,* 57 U.S.L.W. 3227 (1988). (New York Court of Appeals upheld the revocation of a building permit that was

in contradiction to the applicable zoning law). As the "luncheonette" and "cocktail lounge" uses were abandoned by plaintiff, the building inspector's actions were proper and not malicious. Thus, this Court finds that defendants are entitled to judgment as a matter of law, and that the plaintiffs do not have a vested right to operate the building as a hotel. Plaintiffs have apparently not abandoned the building's use for rental apartments.

4. Applications to Enclose Porches and Use Evergreen Lane as an Access

Plaintiffs complain that the defendants' actions, denying plaintiffs' application to enclose porches and gain access over Evergreen Lane, deprived them of their constitutionally protected rights under the fourteenth amendment of the United States Constitution in violation of 42 U.S.C. § 1983—equal protection and due process of the law.

It is well established that a law fair on its face may be applied so arbitrarily and unfairly as to amount to a violation of constitutional rights. *Cook v. City of Pierce, Carbon County, Utah,* 566 F.2d 699, 701 (10th Cir. 1977) (citing *Yick Wo v. Hopkins,* 118 U.S. 356, 374 (1887)). However, when discrimination is not aimed at a "suspect class", a plaintiff must show intentional or purposeful discrimination. *Cook, supra,* 566 F.2d at 701 (citing *Snowden v. Hughes,* 321 U.S. 1, 8 (1944)). The conscious exercise of some selectivity in enforcement is not, in itself, constitutional violation. *Cook, supra,* 566 F.2d at 701 (upheld selective enforcement of residential zoning restrictions, prohibiting only the most egregious).

Plaintiffs allege that the defendants granted other applications to enclose porches, and thereby purposefully discriminated against plaintiffs in violation of the fourteenth amendment and equal protection clause. At his deposition the building inspector stated that the approved applications he recalled involved building decks and expanding rooms,

and that, although uncertain, he did not recall any successful applications for enclosing porches. *See* Maloney Affidavit, Exhibit B Line 4-7. By the building inspector's affidavit, defendants rebut plaintiffs claim of discrimination with evidence that most of the approved applications did not involve the enclosure of porches. Plaintiffs again fail to show any actual evidence of purposeful discrimination. Moreover, although the bungalow colony is now a vested nonconforming use, zoning authorities may adopt regulations that restrict the right of the property owner to alter the structures on the property on which a vested nonconforming use exists. *Fairmeadows Mobile Village, supra,* 226 N.Y.S.2d at 569. Furthermore, plaintiffs have no constitutionally vested right in enclosing the porches because a variance is needed to enclose these porches. Plaintiffs have a constitutionally protected claim of entitlement to the issuance of a license or certificate only if "absent the alleged denial of due process, there is a strong likelihood that the application would have been granted . . . otherwise the application would amount to a mere unilateral expectancy not rising to the level of a property right guaranteed against deprivation by the fourteenth amendment." *Dean Tarry, supra,* 826 F.2d at 212 (citing *Sullivan v. Town of Salem,* 805 F.2d 81, 85 (2d Cir. 1986) and *Yale Auto Parts v. Johnson,* 758 F.2d 54, 59 (2d Cir. 1985). Plaintiffs had at most an expectation, but lacked any entitlement to enclose the porches, and therefore lacked a cognizable property right under the fourteenth amendment. *Board of Regents, supra,* 408 U.S. at 576.

Plaintiffs further allege that the defendants' refusal to allow Evergreen Lane to be used as an access was discriminatory and in violation of the equal protection clause. Plaintiffs allege that the Planning Board selectively enforced certain "technical" zoning requirements against them but not others. *See* Amended Complaint ¶69. This Court finds that the plaintiffs failed to state facts supporting

purposeful discrimination. As stated above, plaintiffs also lacked a cognizable property right in having its application to use Evergreen Lane as an access. *Dean Tarry, supra,* 826 F.2d at 212. Plaintiff entered into the contract of sale, with the estate of Carl Bartels, contingent upon the Town's granting approval of Evergreen Lane as an access, which evidences at most an expectation and the absence of a legitimate claim of entitlement.

The plaintiffs also allege violation of due process by the defendants regarding the applications for both the enclosure of porches and access to Evergreen Lane. Procedural due process requires that the plaintiffs receive adequate notice and a meaningful opportunity to be heard, both of which were satisfied in the present case. *Dean Tarry Corp., supra,* 650 F. Supp. at 1551. The record before this Court suggests that at all times plaintiffs have been in contact with the defendants and have had an opportunity to be heard. Consequently, this Court finds that the plaintiffs' right to due process has not been violated.

False Arrest

Plaintiff, Marvin H. Greene, further sets forth a cause of action for false arrest. The plaintiff specifically alleges that the Building Inspector is liable for false arrest and acted maliciously by issuing plaintiff a criminal summons for operating a dump on his property in violation of the New York State Uniform Fire Prevention and Building Code and the Municipal Code of the Town of Blooming Grove, and thereafter, filing five criminal informations in the Town Court with respect to the alleged violations.

False arrest would form the basis for a § 1983 claim for violating plaintiff's constitutional rights if plaintiff had been arrested either without probable cause or by the use of excessive force. *Pratt v. Bernstein,* 533 F. Supp. 110, 114-15 (S.D.N.Y. 1981). Based upon the foregoing, and

since the defendant was neither arrested nor taken into custody by the defendant the § 1983 claim must fail.

Although the plaintiff does not allege malicious prosecution he does state that the acts of the building inspector were malicious. *See* Amended Complaint ¶103. The institution of a groundless prosecution may be grounds for a § 1983 claim. *Pratt, supra,* 533 F. Supp. at 115-16; *Singleton, supra,* 632 F.2d at 194-95. The requirements for such a § 1983 claim include, *inter alia,* that (1) the allegedly malicious proceeding against the plaintiff terminated in some manner indicating that the plaintiff was not guilty of the offense charged and that (2) the defendant initiated the proceedings with the intent merely to harm the prosecuted party. *Pratt, supra,* 533 F. Supp. at 116. No determination in favor of the plaintiff, Marvin H. Greene, has been made to this Court's knowledge. Furthermore, the plaintiff has failed to show that the defendants brought charges solely to injure him rather than to rectify an unpermitted land use on the plaintiffs' property. The plaintiff admits that on his property he operates a dump, which the Town alleges is in violation of the zoning ordinances and laws of Blooming Grove and the State of New York. Consequently, plaintiff's constitutional rights were not violated by the serving of the summons and filing of criminal informations.

Search and Seizure

Plaintiffs waive their eighth cause of action which alleged an unlawful search and seizure by the building inspector who entered plaintiffs' property to view the dump and gather evidence. Plaintiffs concede that under *Oliver v. U.S.,* 466 U.S. 170 (1984), searching an open field, or in this case a dump in an open field, does not violate the fourth amendment.

Taking of Plaintiffs' Property in Violation of the Fifth Amendment

Plaintiffs cannot state a cognizable claim under the takings clause in a zoning case unless the plaintiffs can "demonstrate that . . . [they have] been deprived of all reasonable used of . . . [their] land. *Dean Tarry Corp., supra,* 650 F. Supp. at 1550 (citing *C.F. Lytle Co., v. Clark,* 491 F.2d 834, 838 (10th Cir. 1974). The plaintiffs have not made a showing that other uses cannot be made of the property or that it has become worthless. On the contrary, this Court finds that the plaintiffs' property retains several reasonable uses, apparently including residential development.

CONCLUSION

This Court grants summary judgment for the defendants, dismissing all claims in the plaintiffs' complaint.

SO ORDERED

SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
November 19, 1988

APPENDIX C—Opinion of the United States Court of Appeals for the Second Circuit, Dated July 17, 1989, Remanding the Case.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 989—August Term 1988

Argued: April 6, 1989 Decided: July 17, 1989

Docket No. 89-7017

MARVIN H. GREENE and LAKE ANNE REALTY CORPORATION,

Plaintiffs-Appellants,

—against—

TOWN OF BLOOMING GROVE, SUPERVISOR AND TOWN BOARD OF THE TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE AND BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Defendants-Appellees.

Before:

KAUFMAN, PRATT, and MINER,

Circuit Judges.

Appeal from summary judgment for defendants granted by the United States District Court for the Southern District of New York, Shirley Wohl Kram, *Judge*, in zoning case brought under 42 U.S.C. § 1983.

Affirmed in part and reversed in part.

CHARLES G. MILLS, Glen Cove, NY (Payne, Wood & Littlejohn, Daren A. Rathkopf, of Counsel), *for Plaintiffs-Appellants*.

PATRICK J. MALONEY, New York, NY (D'Amato & Lynch, Robert E. Meshel, of Counsel), *for Defendants-Appellees*.

PRATT, *Circuit Judge*:

Plaintiffs Marvin H. Greene and his wholly owned corporation, Lake Anne Realty Corp., (collectively "Greene"), appeal from a summary judgment dismissing, *inter alia*, their claims under 42 U.S.C. § 1983 alleging (1) that the Town of Blooming Grove, its planning board, its zoning board of appeals, and certain town officials (collectively "Blooming Grove" or "town") deprived Greene of due process and equal protection under the fourteenth amendment by classifying a portion of Greene's land as R-80 residential rather than R-30, and (2) that Greene was deprived of property without due process, also in contravention of the fourteenth amendment, by the town's failure to recognize his claim to a nonconforming bungalow

colony use for the full 136 acres designated as a bungalow colony in an approved map dated October 28, 1960.

Because Greene has shown no disputed, material issues of fact on his challenge to the R-80 zoning classification of part of his land, we affirm the summary judgment dismissing that claim. On the question of whether Greene's vested nonconforming use as a bungalow colony should extend to the entire parcel, we reverse and remand for further proceedings because triable issues of fact are presented.

I. BACKGROUND

In 1952 Greene purchased approximately 710 acres of land in the Town of Blooming Grove, Orange County, New York—700 acres on the east side of Salisbury Mills Road and 10 acres on the west side. Greene intended to use all of the ten-acre parcel and part of the larger parcel as a vacation resort called Lake Anne Country Club to consist of a hotel, bungalow units, a swimming pool, and other recreational facilities. By June 1953 Greene had built ten two-unit bungalows on the larger parcel.

Prior to October 28, 1960, Greene submitted to the town planning board for approval a revised Lake Anne Country Club bungalow colony map, that designated for bungalow colony use a total of 136 acres, including the ten acres on the west side of Salisbury Mills Road. That map showed that by 1960 Greene had added, on the ten-acre parcel on the west side of the road: a luncheonette and cocktail lounge and other buildings including six units and six bedrooms; and on the 126 acres on the east side of the road: (1) on approximately ten acres, most of the now existing 120 bungalow units; (2) on an additional five acres, other buildings containing multiple bungalow units;

(3) on another twenty acres, an outdoor pool and athletic facilities, and (4) approximately ten acres of ski facilities.

In addition, Greene had already constructed an "infrastructure" to service the entire planned bungalow colony, including a water supply system claimed to be capable of supporting 544 bungalow units, an indoor swimming pool, and an outdoor swimming pool. He was also proposing to construct, and later did construct, a casino.

On October 28, 1960, the planning board approved Greene's map showing all the above facilities. In 1973 Greene applied to the planning board for approval of a further revised map of Lake Anne Country Club bungalow colony which would have added 264 new bungalow units to the 123 existing units. Contending that the application fell within a town-wide moratorium on "construction of single-family dwellings in subdivisions and multiple dwellings", the planning board refused to consider the application. In a subsequent article 78 proceeding, the New York Supreme Court, Rockland County, held that Greene's application was not subject to the moratorium. *In the Matter of Application of Marvin Greene v. The Planning Board of Blooming Grove*, No. 1173/74 (N.Y. Sup. Ct. July 17, 1974) (unreported).

The town appealed, but, on October 7, 1974, before the appellate division had ruled on the town's appeal, Blooming Grove repealed its zoning ordinance and replaced it with the Town of Blooming Grove Zoning Ordinance of 1974. Among other changes, the new ordinance eliminated bungalow colonies as a permitted use. Thereafter, the appellate division dismissed the town's appeal as moot.

On June 10, 1986, Greene, asserting a vested right to a nonconforming use of the entire 136 acres designated in

the approved 1960 map as a bungalow colony, applied to the town's building inspector for a permit to build 419 additional bungalow units conforming with the zoning restrictions applicable at the time bungalow colonies had been a permitted use. Although the town attorney wrote an opinion letter in January 1987 to the building inspector, stating that Greene had no vested right to use the entire 136 acres as a planned bungalow colony, the building inspector has apparently neither issued the permit nor denied the application.

The 1974 zoning ordinance also established new residential zoning classifications. Under the ordinance most of Greene's property was placed in an R-30 district (minimum lot size of 30,000 square feet), but approximately thirty-five acres, not a part of the land designated for bungalow colony use, were classified R-80 (minimum lot size of 80,000 square feet).

Greene brought this civil rights action in federal district court pursuant to 42 U.S.C. § 1983 claiming, *inter alia*, (1) that the R-80 classification of a portion of his property was arbitrary and capricious and deprived him of due process and equal protection in violation of the fourteenth amendment, and (2) that failure to permit the use of the entire 136 acres, designated in the 1960 map for use as a bungalow colony, constituted a deprivation of property without due process of law in violation of the fourteenth amendment. Finding no material factual issues in dispute with respect to any of Greene's claims, the district court granted Blooming Grove's motion for summary judgment on all claims. This appeal followed.

II. DISCUSSION

Summary judgment is appropriate under Fed. R. Civ. P. 56(c) when, viewing the record in the light most favorable to the nonmoving party, *see United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 249 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987), there "is no genuine issue as to any material fact and * * * the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). To defeat such a motion, the nonmoving party must offer " 'concrete evidence from which a reasonable juror could return a verdict in his favor' ". *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114 (2d Cir. 1988) (quoting *Anderson v. Liberty Lobby*, 477 U.S. at 256). We must analyze Greene's claims under these standards.

A. *The R-80 Classification*

Greene asserts that material factual issues preclude summary judgment on his claim that inclusion of approximate thirty-five acres of his land in the R-80 district rather than the less restrictive R-30 district deprived him of due process equal protection in violation of the fourteenth amendment. We disagree. Generally a municipal zoning ordinance is presumed be valid, *see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), and will not be held unconstitutional if wisdom is at least fairly debatable and it bears a rational relationship to a permissible state objective. *Id.*; *Village Belle Terre v. Boraas*, 416 U.S. 1, 4, 8 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-90, 395 (1926).

Moreover, unless they impinge upon a constitutionally protected fundamental interest, we review zoning ordinances only to determine whether they are arbitrary or unreasonable, *see RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 914-15 (2d Cir. 1989) ("zoning regulations will survive substantive due process challenge unless they are 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare' ") (quoting *Ambler Realty Co.*, 272 U.S. at 395); *Brady v. Town of Colchester*, 863 F.2d 205, 215-16 (2d Cir. 1988); *Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165, 1167 (5th Cir. 1986) (because zoning is a quasi-legislative process, local zoning ordinances are reviewed only to determine if arbitrary and capricious). A federal court typically will not "sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation". *City of Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in judgment in part and dissenting in part) (citations omitted).

Significantly, Greene does not contend that the R-80 classification of his property destroys its value or deprives him of any reasonable use of the land. Instead, he argues that the boundary between the R-80 and R-30 districts that crosses his property follows a straight line at approximately 800 feet of elevation until it veers sharply from what Greene calls its "natural, rational and logical course" to an elevation of 620 feet, placing more of Greene's property in the more restrictive district. Greene contends that in drawing this boundary line, the town acted arbitrarily and capriciously, with the sole purpose of depriving him of the same property rights afforded similarly situated landowners.

We agree with the district court that the R-80 districts are rationally related to Blooming Grove's legitimate state interests of (1) preventing overcrowding and (2) providing adequate support for single family dwellings on land that is rough and of higher elevation.

Even accepting Greene's information that the particular R-80 district in question encompasses land at 620 feet of elevation as well as at 800 feet, we discern no disputed material facts that would preclude summary judgment. First, more than twelve areas throughout Blooming Grove are subject to R-80 use restrictions, and although Greene asserts that he is being treated differently from other similarly situated landowners, he has produced no evidence that only his R-80 land includes some land at 620 feet. Second, even absent evidence from Greene that no other land at 620 feet is zoned in an R-80 district, Blooming Grove is certainly free to classify as R-80 only some of its land having elevations between 620 and 800 feet, since imprecision is permitted in regulations such as those at issue here, *see City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (the Supreme Court "consistently defers to legislative determinations as to the desirability of particular statutory discriminations"), and "reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); *accord City of New Orleans*, 427 U.S. at 303.

Accordingly, because Blooming Grove's R-80 districts are rationally related to legitimate state interests and because Greene has raised no triable issues of fact, we affirm the district court's grant of summary judgment dismissing this claim.

B. *Nonconforming Use*

Relying on an approved 1960 map that designated 136 acres for use as a bungalow colony, Greene claims a vested right under state law to expand his nonconforming use to the entire parcel by building 419 additional bungalow units. Denial of this right, Greene claims, constitutes a deprivation of property without due process. He further contends that because there are genuine issues of material fact as to the nature and extent of his vested right, the district court erred in granting summary judgment against him. We agree that a disputed question of material fact remains and, therefore, reverse and remand this claim for further proceedings.

To state a claim under the fourteenth amendment for deprivation of a property right without due process of law in the context of a zoning dispute, Greene must establish that he has a protectible property interest as defined by state law. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 915-18 (2d Cir. 1989).

This circuit uses an entitlement or property-interest analysis to determine if a plaintiff's claimed interest in land is sufficient to constitute "property" under the fourteenth amendment. *RRI Realty Corp.*, 870 F.2d at 917. The analysis focuses primarily on the "degree of official discretion and not on the probability of its favorable exercise". *Id.* at 918. In *RRI Realty Corp.*, the claimed "property" interest was an entitlement to a building permit. Primarily because the town officials had discretion to either grant or deny the permit, we held that the plaintiff had no entitlement sufficient to trigger fourteenth amendment protection. *Id.* at 919. In this case, by contrast, the parties do not dispute, and we agree, that Greene's non-

conforming use constitutes "property" under the fourteenth amendment. At the time of enactment of the 1974 zoning ordinance, Greene did acquire under New York law, a protectible property right—the right to a vested nonconforming use of at least a portion of his property as a bungalow colony—and he is entitled to continue that use. The only dispute is the scope of his property right. That scope, particularly whether it includes the right to construct additional bungalows on the premises, is determined by state law and is a matter as to which zoning officials have no discretion.

Under New York law, a vested nonconforming use is one that existed before enactment of the zoning ordinance prohibiting the use and that is continuously maintained after the zoning changes. *City of New York v. Bilynn Realty Corp.*, 118 A.D.2d 511, 499 N.Y.S.2d 1011, 1014 (1st Dep't 1986). Although a landowner has no vested interest in the existing classification of his property, *see Ellentuck v. Klein*, 570 F.2d 414, 429 (2d Cir. 1978), a zoning ordinance cannot prohibit a use to which the property is lawfully devoted at the time the ordinance is enacted. *Syracuse Aggregate Corp. v. Weise*, 51 N.Y.2d 278, 284, 434 N.Y.S.2d 150, 153 (1980).

To establish a nonconforming use, the person claiming the right must show more than mere contemplated use of property for the nonconforming purpose; he must show the property was indeed used for the nonconforming purpose at the time the ordinance became effective. *Syracuse Aggregate Corp.*, 51 N.Y.2d at 284-85, 434 N.Y.S.2d at 153. Every inch of the property, however, need not have been embraced by the nonconforming use in order to entitle the entire property to protection as a nonconforming use. *Id.* at 285, 434 N.Y.S.2d at 153.

The test in New York is "whether the nature of the incipient non-conforming use, in the light of the character and adaptability to such use of the entire parcel, manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance." *Fairmeadows Mobile Village, Inc. v. Shaw*, 16 A.D.2d 137, 142, 226 N.Y.S.2d 565, 569 (4th Dep't 1962) (quoting *Gross v. Allan*, 37 N.J. Super. 262, 272, 117 A.2d 275, 280 (1955)); *Syracuse Aggregate Corp.*, 51 N.Y.2d at 285, 434 N.Y.S.2d at 153; *Marra v. State of New York*, 61 A.D.2d 38, 42, 401 N.Y.S.2d 349, 351 (4th Dep't 1978). Furthermore, when a restrictive zoning ordinance is enacted, an owner may complete his construction of a nonconforming use if substantial construction and substantial expenditures have been made prior to the effective date of the ordinance. *Putnam Armonk, Inc. v. Town of Southeast*, 52 A.D.2d 10, 14, 382 N.Y.S.2d 538, 541 (2d Dep't 1976).

Under these standards, the evidence to show that the character of the nonconforming use extends beyond the developed portion of the 136 acres to the entire parcel, is sufficient to defeat summary judgment. First, the map that was approved on October 28, 1960, specifically designated approximately 136 acres for bungalow colony use, including the 126 acres on the east side of Salisbury Mills Road. Second, Greene produced evidence that approximately fifty-five acres of land, including forty-five acres on the 126-acre portion on the east side of the road, contained bungalow colony units, supporting buildings, or athletic facilities before bungalow colonies became a prohibited use. Further, Greene claims that, including open spaces between buildings and athletic facilities, approximately 100 acres had already been devoted to bungalow colony use before 1974. Third, the "infrastructure", including a water supply system and recreational facilities,

all claimed to be capable of servicing the entire planned bungalow colony, had also been put in place before bungalow colonies became a prohibited use. *See Telimar Homes, Inc. v. Miller*, 14 A.D.2d 586, 586-87, 218 N.Y.S.2d 175, 176-77 (2d Dep't 1961) (construction of infrastructure including water system, roads, drainage system, and model house entitled landowner to a vested right to nonconforming use as to the entire tract). Fourth, although the town has surmised that "[t]he expenses that Greene may have incurred for his infrastructure have surely been recouped by revenue received since the 1960s", Greene by affidavit expressly contradicted this conclusion, stating instead that "[p]laintiffs have not recouped their investment in * * * the casino, * * * the indoor swimming pool in that building, the outdoor swimming pool and the water supply * * * ."

These circumstances and others create a genuine factual issue as to whether Greene's noncomforming bungalow colony use includes, as a matter of property right under New York law, the construction of the additional bungalow units. In short, because a disputed, material question of fact was raised regarding whether the "nature of the incipient non-conforming use * * * manifestly implie[d] an appropriation of the entirety [of the parcel to the nonconforming] use", *Fairmeadows Mobile Village*, 16 A.D.2d at 142, 226 N.Y.S.2d at 569, summary judgment was inappropriate on this claim.

C. *Other Issues*

We have carefully reviewed Greene's other claims, including his claim that he did not abandon use of a certain building as a hotel, and finding no genuine issue of

material fact with respect to these claims, we affirm the district court's summary judgment dismissing them.

III. CONCLUSION

The judgment of dismissal is affirmed as to all claims except the claim that the vested nonconforming use of Greene's land as a bungalow colony extends to the entire 136 acres previously approved for bungalow colony use. On that claim the judgment is reversed, and the case is remanded to the district court for further proceedings.

APPENDIX D—Joint Pre-Trial Order, Dated January, 1990.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MARVIN H. GREENE and LAKE ANNE REALTY CORP.,

Plaintiffs,

against

TOWN OF BLOOMING GROVE, SUPERVISOR and TOWN BOARD OF THE TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE and BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Defendants.

87 Civ. 0069 (SWK) JURY

1. The pleadings are deemed amended in accordance with the framing of the issues in this action in this pre-trial order.

2. The parties agreed that the trial of this action should be based upon this order and upon the pleadings (as amended).

3. There have been the following motions and rulings:

1) The defendants moved for an order dismissing the complaint pursuant to Rule 12 or in the alternative for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The motion was granted and the Second Circuit reversed in part and affirmed in part and held that plaintiffs' claim of a vested right to improve their bungalow colony by the addition of 419 units presented a triable question of fact.

2) The plaintiffs moved for an order granting partial summary judgment declaring that plaintiffs have a valid vested right to improve their bungalow colony by the addition of an additional 419 units or alternatively declaring that plaintiffs have a valid vested right to improve their bungalow colony by the addition of an additional 264 units. The court denied this motion.

4. The parties' claims for relief remaining in the case are as follows:

(a) The plaintiffs demand judgment against defendants as follows:

1) In sum of $10,000,000 pursuant to the provisions of 42 U.S.C. §1983 together with costs including reasonable attorneys fees pursuant to 42 U.S.C. §1988.

2) Declaring that plaintiffs have a valid vested right to improve their bungalow colony by the addition of an additional 419 units in accordance with the provisions of the zoning ordinance in force prior to the adoption of the Zoning Ordinance of 1974 as shown on the map submitted with plaintiffs' application for a building permit and directing the defendant Building Inspector to issue to plaintiffs a permit for the first of said units as applied for.

3) Enjoining defendants from violating plaintiffs' rights under the United States Constitution.

4) Granting such other and further relief as this court may deem just and proper.

(b) The defendants allege no counterclaims but in their demand for relief they demand judgment dismissing plaintiffs' complaint, together with costs, disbursements and reasonable attorney's fees incurred in this action, as well as such other, further and different relief as the court may deem just and proper in the circumstances.

5. The parties stipulate that the following facts are not in dispute in this action. Each party reserves the right to object to the materiality or relevance of any such stipulated fact:

1) The United States District Court, Southern District of New York has jurisdiction over this action.

2) Lake Anne Realty Corp. is the fee owner of the following parcels of real property situated in the Town of Blooming Grove, Orange County, State of New York:

a) An approximately 627.3 acre parcel known as Section 41, Block 1, Lot 3 on the Orange County Tax Map.

b) An approximately 10 acre parcel known as Section 18, Block 2, Lot 10 on the Orange County Tax Map.

3) Lake Anne Realty Corp. is a New York Business Corporation and Marvin H. Greene is its president and sole shareholder.

4) The defendant Town of Blooming Grove is a municipal corporation, is a political subdivision of the State of

New York, and is located in Orange County, State of New York, and the other defendants are officers or boards of the defendant Town of Blooming Grove.

5) On or about October 7, 1974 the Town of Blooming Grove adopted a new zoning ordinance. The Town of Blooming Grove adopted the new zoning ordinance pursuant to the authority delegated to the Town by New York Town Law, Article 16, §§261-284.

6) On October 28, 1960 the Planning Board of the Town of Blooming Grove approved a bungalow colony map for the Lake Anne Country Club as it was revised on October 12, 1960.

7) A copy of the bungalow colony map approved by the planning board on October 28, 1960 is annexed to the amended complaint in this action as Exhibit A.

8) The area of the Lake Anne Country Club bungalow colony as shown on the map approved October 28, 1960 is 136± acres.

9) The 136± acres of the Lake Anne Country Club bungalow colony constitutes all of Section 18, Block 2, Lot 10 and part of Section 41, Block 1, Lot 3 on the Orange County Tax Map.

10) Prior to October 7, 1974 bungalow colonies on property which had been lawfully used as such on or before June 9, 1953 were a permitted use in the district in which plaintiffs' bungalow colony was situated.

11) The Lake Anne Country Club Bungalow Colony had lawfully been used as such on or before June 9, 1953.

12) The new zoning ordinance which the Town of Blooming Grove adopted on or about October 7, 1974 rezoned the district in which the bungalow colony was situated to allow, as the principal permitted use, single family dwellings on lots of a minimum size of 30,000 square feet with community sanitary or water plant and 40,000 square feet without community sanitary or water plant and bungalow colonies were no longer listed as a permitted use.

13) On October 17, 1973 Marvin H. Greene applied to the Planning Board of the Town of Blooming Grove for approval of an amendment to the Lake Anne Country Club bungalow colony map showing the addition of a proposed 264 dwelling units.

14) On October 17, 1973, when Marvin H. Greene made the application referred to in Item 13, the 1962 Zoning ordinance of the Town of Blooming Grove authorized the planning board to approve revised bungalow colony maps showing additional units.

15) The planning board did not consider Marvin H. Greene's application for amendment of the Lake Anne Country Club bungalow colony map on the grounds that it could not because of a local moratorium law adopted by the Town of Blooming Grove.

16) The Supreme Court, Rockland County, thereafter determined that the moratorium was inapplicable, but before an appeal was decided, the moratorium expired and, on March 25, 1975, the appeal was dismissed as moot.

17) The new Zoning ordinance adopted by the Town of Blooming Grove on or about October 7, 1974 did not include planned bungalow colonies as a permitted use and

deleted the provisions of the prior ordinance which authorized the planning board to approve bungalow colony maps.

18) A portion of the parcel of 136± acres shown on the approved Lake Anne Country Club bungalow colony map is improved by 125 units and a service infrastructure consisting of a clubhouse, outdoor pool, indoor pool and water system.

19) The existing 125 dwelling units and the existing clubhouse, outdoor pool, indoor pool and water system on the 136± acres devoted to the Lake Anne Country Club Bungalow Colony were existing prior to the 1974 amendment of the zoning ordinance of the Town of Blooming Grove.

20) Prior to its amendment in 1974 the zoning ordinance of the Town of Blooming Grove permitted dwelling units at a planned bungalow colony at a density of four units per acre.

21) On or about July 3, 1986 Lake Anne Realty Corp. submitted an application for a building permit to the building inspector of the Town of Blooming Grove.

22) The application for a building permit referred in Item 21, *supra,* was an application to permit the construction of the first of a proposed additional 419 dwelling units to be added to the existing dwelling units at the bungalow colony.

23) The Building Inspector of the Town of Blooming Grove asked Donald G. Nichol, Esq., the attorney for the Town of Blooming Grove, for an opinion regarding whether a building permit could be issued upon the application referred to in Item 21, *supra.*

24) By letter dated January 29, 1987 addressed to Geraldine Sherman, Building Inspector, Donald G. Nichol, Esq., the Town's attorney, expressed the opinion that plaintiffs enjoyed no vested right to use the premises as a planned bungalow colony, and that the building inspector had no authority to issue a building permit as requested.

25) In the letter referred to in Item 24, *supra*, the Town's attorney states, *inter alia,* as follows:

> "The facts as alleged by Mr. Greene indicate that the planning board had approved a map for a 'planned bungalow colony', a use which later became nonconforming. We made a diligent search for an approved map, both through the Building Department and through the Planning Board's Clerk, but were unable to find such a map. Additionally, we were unable to uncover any planning board minutes which would indicate any approval was given to such a map."

26) Melanie Roberts, the Clerk of the Planning Board of the Town of Blooming Grove since June 1962 is the keeper of the files of said Planning Board.

27) Melanie Roberts does not remember searching the records of the Planning Board to find whether or not there was an approved bungalow colony map for the Lake Anne Country Club Bungalow Colony.

28) Melanie Roberts does not recall Donald G. Nichol, Esq., having made a search of the records of the Planning Board for an approved bungalow colony map for the Lake Anne Country Club Bungalow Colony.

29) Melanie Roberts is not aware of the fact that Donald G. Nichol, Esq. has stated that there is no approved bungalow colony map for the Lake Anne Country Club Bungalow Colony in the files and does not recall anyone requesting her to make a search for a missing map of the Lake Anne Country Club Bungalow Colony or of anyone else looking for a missing map of the Lake Anne Country Club Bungalow Colony and has heard no discussion as to any missing map or missing minutes relating to the Lake Anne Country Club Bungalow Colony.

30) At no time did Donald G. Nichol or the building inspector or anyone else on behalf of the Town of Blooming Grove ask Marvin H. Greene whether he had any information with regard to the approved bungalow colony map for the Lake Anne Country Club bungalow colony or a copy of the approved map or whether he had any copy of the minutes of the planning board approving said map or whether he knew the date on which the planning board had approved said map.

31) On or about February 9, 1987 Marvin H. Greene supplied to Geraldine Sherman, the Building Inspector of the Town of Blooming Grove, a copy of the planning board minutes of July 17, 1957 showing the first approval of the Lake Anne Country Club bungalow colony map by the planning board and called her attention to the bungalow colony map bearing the endorsement "Approved 10/28/60, Humes M. Flynn, Vice Chairman Town of Blooming Grove Planning Board" a copy of which map had previously been served upon her.

32) The Building Inspector of the Town of Blooming Grove refuses to issue the building permit applied for in the application referred to in Item 21, *supra*.

33) Among the facilities shown on the bungalow colony map approved by the planning board on October 28, 1960 is a ski slope and a ski house.

34) Prior to the adoption of a new zoning ordinance in 1962 there was no provision in the zoning ordinance of the Town of Blooming Grove restricting planned bungalow colonies to seasonal use during the non winter months.

35) The refusal of the Building inspector of the Town of Blooming Grove to issue a building permit as applied for in the application referred to in Item 21 is based upon the Town's claim that the addition of dwelling units to the 136± acre bungalow colony site is contrary to the use restrictions of the zoning ordinance of the Town of Blooming Grove and is further based upon the Town's claim that plaintiffs do not enjoy a vested right to a bungalow colony use or a vested right to add additional dwelling units to the Lake Anne Country Club bungalow colony and that public health, welfare and safety would be impaired by virtue of the proposed construction.

6. As to the disputed facts the parties contend as follows:

1) (Plaintiffs' proposed finding) The Town of Blooming Grove at all times in or after 1957 and until on or about January 29, 1987 recognized plaintiffs' right to operate a year round bungalow colony.

(Defendants' proposed finding) A bungalow colony is defined as use of land during non-winter months. Winter use destroys the subdivision's character as a bungalow colony.

2) (Plaintiffs' proposed finding) Prior to October 7, 1974 plaintiffs constructed a service infrastructure designed for and adequate for the whole bungalow colony including 544 units.

(Defendants' proposed finding) The alleged service infra structure is inadequate to support 544 units and, in fact, does not adequately support the existing units.

3) (Plaintiffs' proposed finding) Prior to 1962 plaintiffs constructed a service infrastructure designed for an adequate for the whole bungalow colony including 544 units.

(Defendants' proposed finding) The alleged service infra structure is inadequate to support the planned development.

4) (Plaintiffs' proposed finding) The map approved on October 28, 1960 dedicated 136± acres to the Lake Anne Country Club bungalow colony.

(Defendants' proposed finding) The 1960 map shows vacant land with only 10± acres improved by bungalows.

5) (Plaintiffs' proposed finding) Plaintiffs have never recouped their investment in the Lake Anne Country Club bungalow colony.

(Defendants' proposed finding) Plaintiffs have recouped their investment in the infra structure or have abandoned an attempt to so recoup.

6) (Plaintiffs' proposed finding) From October 28, 1960 to the present time plaintiffs have never ceased to operate the Lake Anne Country Club bungalow colony and have never abandoned any part of the 136± acres as mapped as a part thereof.

(Defendants' proposed finding) Plaintiffs have abandoned the bungalow colony use.

7) (Plaintiffs' proposed finding) Defendants concealed plaintiffs' approved bungalow colony map and pretended there was no approved bungalow colony map with the intention of depriving plaintiffs of rights protected under the United States Constitution.

(Defendants' proposed finding) No evidence supports the contention that Defendants concealed an approved map, if one ever existed.

8) (Plaintiffs' proposed finding) Defendants refusal to permit plaintiffs to add additional units to the Lake Anne Country Club bungalow colony so as to complete the development of the 136± acre bungalow colony site was pursuant to official policy, custom or usage of the Town of Blooming Grove and was done under color of state and local law.

(Defendants' proposed finding) Defendants' actions constitute legal and valid exercises of government police power.

9) (Plaintiffs' proposed finding) Plaintiffs have suffered damages as a result of the defendants' refusal to permit plaintiffs to add additional units to the Lake Anne Country Club bungalow colony.

(Defendants' proposed finding) Plaintiffs have suffered no damages.

10) (Plaintiffs' proposed finding) On July 17, 1957 the Planning Board of the Town of Blooming Grove approved a bungalow colony map for the Lake Anne Country Club.

(Defendants' proposed finding) Defendants contend no approved 1957 map has been introduced.

11) (Plaintiffs' proposed finding) Upon the adoption of the 1974 zoning ordinance, the use of the 136± acre parcel shown on the approved bungalow colony map became a valid nonconforming use of said parcel for a bungalow colony.

(Defendants' proposed finding) If a valid right came into being it extended only to the improved portions of the 136± acre parcel.

12) (Plaintiffs' proposed finding) The Lake Anne Country Club Bungalow Colony has always been used as a year-round bungalow colony and has never been closed in the winter.

(Defendants' proposed finding) The alleged bungalow colony operated primarily, if not exclusively, during the non-winter months.

7. The issues of law presented by this case are as follows:

1) Where an entire 136± acre parcel in New York State is committed to bungalow colony use but only a portion of said parcel has been developed for such use and the bungalow colony use becomes a vested nonconforming use by reason of the adoption of a zoning ordinance amendment under which bungalow colonies are no longer among the uses permitted by the ordinance, does the owner have a vested right to develop the entire parcel for such use?

Plaintiffs conclude that he has.

Defendants conclude that he has not.

2) Where a 136± acre parcel in New York State is committed to bungalow colony use and where only a portion of said parcel has been developed for such use although an infrastructure has been provided for the complete development of the parcel for such use, and the bungalow colony use becomes a vested nonconforming use by reason of the adoption of a zoning ordinance amendment under which bungalow colonies are no longer among the uses permitted by the ordinance, does the owner have a vested right to develop the entire parcel for such use in accordance with the provisions of the prior zoning ordinance?

Plaintiffs conclude that he has.

Defendants conclude that he has not.

3) Are vested rights predicated upon an infrastructure lost by the receipt of revenue (income) from the operation of that infrastructure?

Plaintiffs conclude that they are not.

Defendants conclude that they are.

4) Does the removal of records from municipal files for the purpose of preventing a property owner from proving his entitlement to a vested non-conforming use deprive the property owner of due process of law in violation of the 14th Amendment of the Constitution of the United States?

Plaintiffs conclude that it does.

Defendants conclude that it does not.

5) Where a property owner has a vested right to add units to his bungalow colony does refusal of the building inspector to issue a building permit to allow the construc-

tion of such units deprive the property owner of due process of law in violation of the 14th Amendment of the Constitution of the United States?

Plaintiffs conclude that it does.

Defendants conclude that it does not.

6) Does the recognition of a nonconforming use by a municipality as vested for more than twenty years estop the municipality from claiming thereafter that the nonconforming use had not vested?

Plaintiffs conclude that it does.

Defendants conclude that it does not.

7) Do Plaintiffs' plans to add 419 buildings to its property constitute a subdivision under New York Law?

Plaintiffs conclude that it does not.

Defendants conclude that it does.

8) If Plaintiffs undertook no substantial improvements in the period from October 1974 to October 1977, does any alleged vested right expire?

Plaintiffs conclude that it does not.

Defendants conclude that it does.

9) Does the failure of Plaintiffs to comply with State requirements for obtaining subdivision approval relieve Defendants from any liability for not issuing a building permit to expand the non-conforming subdivision.

Plaintiffs conclude that no subdivision is involved.

Defendants conclude that it does.

10) Would the failure of the Plaintiffs to attempt to expand their non-conforming use for a period in excess of ten years establish an intent to abandon an alleged vested right to expand a non-conforming use?

Plaintiffs conclude that it would not.

Defendants conclude that it does.

11) Does the voluntary relinquishment of the right to produce revenue from a non-conforming infrastructure establish recoupment of any initial investment?

Plaintiffs conclude that there was no such relinquishment.

Defendants conclude that it does.

7. The exhibits that each party expects to offer at trial are as follows:

(a) the plaintiffs' exhibits:

1. Map of plaintiffs' property by Chumard & McGough dated March 15, 1963. This exhibit is offered to illustrate the plaintiffs' bungalow colony in relation to the rest of plaintiffs' property and to show other features.

2. Deeds to the property which includes the bungalow colony site. The deeds constituting this exhibit are offered to show the ownership of the property during all relevant periods.

3. Letter dated March 12, 1952 from Marvin H. Greene to Town Board. This exhibit is offered to show the intentions of Marvin H. Greene with regard to the subject property.

4. Letter dated March 26, 1952 from the Secretary of the Planning Board to the Supervisor & Members of the Town Board. This exhibit is offered to show an acknowledgment by the Town of the lawfulness of Marvin H. Greene's proposed use.

5. Letter dated May 13, 1952 from A. Dudley Morriss, Zoning Inspector to M. H. Greene. This exhibit is offered to show conformity of the Lake Anne Country Club development to all regulations of the Zoning Ordinance of 1928 with amendments on May 8, 1950.

6. Application of Lake Anne Country Club dated 8/25/54 for a permit to construct a 13 unit building. This exhibit is offered to show one of the motel type buildings constructed at the Lake Anne Country Club bungalow colony.

7. Certificates of occupancy. The certificates constituting this exhibit are offered to show the conformity to law of buildings at the Lake Anne Country Club bungalow colony.

8. July 10, 1957 letter from Marvin H. Greene to Planning Board. This exhibit is offered to show Marvin H. Greene's intentions with regard to the subject property.

9. Planning Board minutes of July 17, 1957 (no year stated). This exhibit is offered to show the resolution of the planning board approving the revised Lake Anne Country Club planned bungalow colony survey map.

10. Letter dated July 30, 1957 from Emily S. Akers, Secretary of the planning board to Leon Liner, Esq. This exhibit is offered to show that the year of the July 17, 1957 minutes was 1957, the year not being stated in the minutes, and the fact that the planning board approved the revised map of Lake Anne Country Club bungalow colony on July 17, 1957.

11. Lake Anne Country Club bungalow colony map approved by planning board October 28, 1960. This exhibit is offered to show the latest amended survey map which was approved by the planning board.

12. Planning Board minutes of October 28, 1960. This exhibit is offered to show the resolution approving the latest amended survey map which was approved by the planning board.

13. Zoning Ordinance of the Town of Blooming Grove, New York—1953 with zoning map and with amendment dated March 10, 1958. This exhibit is offered to show the provisions of the zoning ordinance pursuant to which the planning board approved the Lake Anne Country Club bungalow colony map in 1960.

14. Town of Blooming Grove Zoning Ordinance of 1962 with zoning map. This exhibit is offered to show the provisions of the zoning ordinance prior to the adoption of the 1974 zoning ordinance.

15. Drawing revised December 1962 by Chumard & McGough, Consulting Engineers. This exhibit is offered to show the casino.

16. Drawing dated 12/27/63 by Chumard & McGough, Engineers, stamped by New York State Department of Health 5/6/64. This exhibit is offered to show the swimming pool installed in the casino.

17. Drawing dated May 1961 of outdoor swimming pool by Chumard & McGough, Engineers, with attached letter of approval by George W. Moore, Chief, Water Supply section, State of New York Department of Health. This exhibit is offered to show the outdoor swimming pool.

18. Letter dated July 14, 1973 from Marvin H. Greene to Town Board of Blooming Grove. This exhibit is offered to show that Marvin H. Greene protested the proposed change in the zoning ordinance which would make his bungalow colony a nonconforming use.

19. Town of Blooming Grove Zoning Ordinance of 1974 with zoning map. This exhibit is offered to show the provisions of the zoning ordinance and map adopted in 1974.

20. Decision of Mr. Justice Theodore A. Kelly in Greene v. Planning Board (Supreme Court, Rockland County, Index No. 1173/74). This exhibit is offered to show the facts relating to the submission for approval of a survey map showing an additional 264 units.

21. Decision and order dated September 23, 1975 of Mr. Justice Morton B. Silberman in Greene v. Planning Board (Supreme Court, Rockland County—Index No. 1173/74). This exhibit is offered to show the facts relating to the application to the planning board, the prior decision and order of the court, the appeal to the Appellate Division and the dismissal of that appeal as academic after the expiration of the local moratorium law and the fact that the planning board was not authorized to consider plaintiff's application under the 1874 zoning ordinance.

22. Circa 1954 New York State Ski Guide. This exhibit is offered to show the listing of the Lake Anne Country Club as a winter sports center.

23. Temporary residence permits issued by Dept. of Health 1972-1974, 1976-1980, 1983-1984. This exhibit is offered to show the continued operation of the bungalow colony.

24. Planning board letters to Marvin Greene dated November 30, 1984 and March 8, 1985. These are offered to show that upon a subdivision of plaintiffs' property the Town requires that acreage be set aside for all existing units to meet the density requirements of the R-30 zone.

25. Letter dated June 10, 1986 from Marvin Greene to Geri Sherman together with enclosures consisting of 1) application with rider, 2) house plan, 3) opinion letter dated June 10, 1986 from Daren A. Rathkopf to Marvin H. Greene, 4) letter dated June 10, 1986 from Eustance & Horowitz and 5) sketch plan dated 5/23/86 showing proposed location of the additional units. This exhibit is offered to show the complete application dated June 10, 1986 and submitted by Marvin H. Greene on July 3, 1986 for the first of a proposed additional 419 units to be added to the Lake Anne Country Club bungalow colony.

26. Letter dated January 29, 1987 from Donald G. Nichol, Esq. to Geraldine Sherman, Building Inspector. This exhibit is offered to show the claims made by the Town attorney in denying plaintiffs' vested right to a nonconforming bungalow colony use including, *inter alia,* his statement that no approval of a plan for the bungalow colony was ever given.

27. Two bound account books kept by Marvin Greene from 1946 to 1980 showing monies he put into and took out of Lake Anne Country Club and one bound account book showing income from 1979 to date and separate accounts showing additional income from the hotel. This exhibit is offered to show that plaintiff Marvin Greene did not recoup his investment and to show the continued operation of the bungalow colony.

28. Portions of available income tax returns for the years 1978 through 1988 showing income and expenses of Lake Anne Country Club. These are offered to show that plaintiff Marvin Greene did not recoup his investment and to show the continued operation of the bungalow colony.

29. Portions of available income tax returns for the years 1984 through 1988 showing income and expenses of Lake Anne Water Corp. These are offered to show that plaintiff Marvin Greene did not recoup his investment.

30. Report prepared by Nellon Chu. This exhibit is offered to show that plaintiff Marvin Greene did not recoup his investment.

31. Demographic update Orange County New York 1980 Census, Department of Planning and Economic Development. This exhibit is offered to show the number of rental units in the Town of Blooming Grove in 1980 and the population according to race and the breakdown of accommodations between rental and owner occupied units.

32. Report prepared by Samuel Barash. This exhibit is offered to show plaintiffs' damages.

33. Department of Health certificate dated 2/1/88. This exhibit is offered to show that Marvin H. Greene is a certified Grade "C" Community Water Systems Operator.

34. Curriculum Vitae of Aaron Horowitz. This exhibit is offered to show the professional qualifications of Aaron Horowitz.

35. Curriculum Vitae of John K. Paik. This exhibit is offered to show the professional qualifications of John K. Paik.

36. Curriculum Vitae of Nellon Chu. This exhibit is offered to show the professional qualifications of Nellon Chu.

37. Curriculum Vitae of Samuel T. Barash. This exhibit is offered to show the professional qualifications of Samuel T. Barash.

Photocopies may be offered and admitted in evidence to the same extent as if they were original documents.

8. The witnesses to be called at trial are as follows:

(a) The plaintiffs' witnesses.

1) Marvin H. Greene, one of the plaintiffs, 76 years of age, served four years in World War II, was honorably discharged as a captain in the air force, is the holder of a master of science degree from New York University, has been a builder and general contractor for almost 50 years, was the chief executive in charge of the N.Y.U.—Belleview Slum Clearance Project and is the owner and developer of the Lake Anne Country Club bungalow colony, and the operator, licensed by the State of New York, of the Lake Anne municipal water system. He will testify with regard to all of the facts alleged in the complaint.

2) Aaron Horowitz received his bachelor's degree in civil engineering from the College of the City of New York in 1950, his license as a professional engineer in 1955 and as a land surveyor in 1959 and is president of Eustance & Horowitz, PC, Consulting Engineers, Land Planners, Land Surveyors, Circleville and Fishkill, New York. He will testify with regard to the capacity of the existing facilities provided at the Lake Anne Country Club bungalow colony.

3) Robert F. Liner, Esq., counsel to the firm of Shark, Elman, Amron, Barash and Narotsky, 1133 Avenue of the Americas, New York, New York 10036, has been a member of the New York bar since 1974. He is 41 years old, attended American University and was awarded the J.D. degree from Brooklyn Law School. He will testify as to the plaintiffs' plans for the development of the Lake Anne Country Club bungalow colony.

4) John Staples a licensed electrician worked as an electrical contractor for Marvin Greene at the Lake Anne Country Club. He will testify with regard to Marvin Greene's development plans for the Lake Anne Country Club Bungalow Colony.

5) Philip Shiffman, Esq. has served as Marvin Greene's attorney, is 66 years of age, and was admitted to the New York bar in 1954 after receiving a B.S. degree from Indiana University and LL.B. from New York Law School. He is a long time resident of the Town of Blooming Grove. He will testify as to policies of the Town of Blooming Grove and with regard to the documents presently missing from the defendants' files having previously been in the defendants' files.

6) Pierson McGinnis, aged 38, manager of the Lake Anne Country Club, in charge of rentals and maintenance.

He will testify with regard to Marvin H. Greene's non-discriminatory rental policy and the racial composition of the tenants at the Lake Anne Country Club bungalow colony.

7) John K. Paik is a licensed professional engineer who received his bachelor of science degree in civil engineering from Southern Methodist University, Dallas, Texas in 1961 and his master of science in civil engineering in 1971 and his Ph.D. in engineering and structural mechanics in 1975, both from New York University. He is president of Future Home Technology, Inc., 33 Ralph Street, Port Jervis, New York, a firm engaged in the construction and erection of prefabricated buildings. He will testify with regard to the proposed erection of prefabricated buildings to supply additional units at the Lake Anne Country Club bungalow colony. He will also testify with regard to the capacity of the existing infrastructure at the Lake Anne Country Club bungalow colony.

8) Nellon Chu, a certified public accountant, is a partner in the firm of Primoff, Tashis, Wesien & Co., 122 E. 42nd Street, Suite 1205, New York, New York 10168. He will testify with regard to whether plaintiff Marvin Greene has recouped his financial expenditures on the property.

9) Samuel T. Barash, a licensed real estate broker and appraiser was formerly, for 15 years, a supervisory appraiser with the New York Regional Office of the Veterans Administration and for seven years Chief Appraiser for the Newark, New Jersey Loan Guaranty Office of the Veterans Administration. He will testify with regard to plaintiffs' damages resulting from defendants' failure to allow construction of additional dwelling units at the Lake Anne Country Club bungalow colony.

(b) The defendants' witness:

1) Honorable Nancy Calhoun—Supervisor of the Town of Blooming Grove. Ms. Calhoun will testify as to the Town's dealing with Plaintiffs and Plaintiffs' intent to expand their non-conforming use.

2) Geraldine Sherman—Assistant Building Inspector for the Town of Blooming Grove. Ms. Sherman will testify as to the Town's dealings with Plaintiffs' applications for building permits.

3) Donald Nichol, Esq.—Member of the New York Bar and Town Attorney for the Town of Blooming Grove. Mr. Nichol will testify as to the search of Town records for the non-existent "approved map" alleged by Plaintiffs.

4) Honorable Leo Levy—Clerk of the County of the Bronx. Mr. Levy is a leaseholder at Plaintiff's premises and will testify concerning the infrastructure of the alleged "Bungalow Colony."

9. The prior deposition testimony that each party intends to offer at trial is as follows:

(a) The plaintiffs' intend to offer the following deposition testimony.

Nancy Calhoun, Supervisor of the Town of Blooming Grove, deposed October 13, 1987, pages 4, 5, 6, 23, 24, 27, 41, 42.

Geraldine Sherman, Assistant Building Inspector of the Town of Blooming Grove (Building Inspector June 19, 1985-May 22, 1987), deposed October 13, 1987, pages 4, 5, 29, 30, 85, 86.

Melanie J. Roberts, Clerk of the Planning Board of the Town of Blooming Grove, deposed December 16, 1987, pages 4, 5, 13, 14, 16, 19, 20.

Carl La Perla, Member of the Town Board of the Town of Blooming Grove, deposed October 15, 1987, pages 4-9, 33, 34, 41.

Depositions may be used whether or not the transcript is executed.

10. The time expected for each party to present its case at trial is as follows:

(a) by the plaintiff 2 days

(b) by the defendant 2 days

SO ORDERED

Dated: New York, New York
January 1990

U.S.D.J.

CONSENTED TO BY:

DAREN A. RATHKOPF
Attorneys for Plaintiffs

Attorneys for Defendants

APPENDIX E—The Verdict.

(Time noted 10 p.m.)

(In open court; jury present)

The Court: All right, Mr. Clerk.

The Clerk: Mr. Foreman, would you please rise. Has the jury agreed upon a verdict?

The Foreman: Yes.

The Clerk: I have your verdict form and listen to it as it now stands recorded. Question one: Does the vested non-conforming use of plaintiffs' bungalow colony extend to the entire 136 acres previously approved for bungalow colony use?

The answer is yes.

Question two. With respect to plaintiffs' claim that the refusal of the Town of Blooming Grove to permit the building of additional bungalow colony units on the undeveloped portion of their bungalow colony deprived them of a property right protected by the United States constitution in violation of 42 United States Code Section 1983, have plaintiffs proven this claim by a preponderance of the evidence?

You must make a separate finding on the issue of liability for each defendant.

Is the building inspector of the Town of Blooming Grove liable to plaintiffs?

The answer is no.

Is the Town of Blooming Grove liable to the plaintiffs?

Your answer is no.

Therefore, there is no need to go any further.

Is that your verdict?

The Foreman: Yes, it is.

The Court: All right, would you poll the jury, please.

(Jury polled and all answered in the affirmative)

The Clerk: Jury polled, verdict unanimous, your Honor.

The Court: I am going to dismiss you now with very sincere thanks. It has been a very rough day and I want to thank you for your careful and thorough attention. You really did a very wonderful job and we're very grateful to you.

Thank you and good night.

(Jury excused)

The Court: All right, is there anything further.

Mr. Maloney: Yes, your Honor, we would move for a dismissal of the finding of the state law property right since the jury verdict finding no violation of federal statute could have divested the subject matter jurisdiction over the state law claim.

The Court: Do you want to address yourself to that, Mr. Rathkopf?

Mr. Rathkopf: Well, I oppose that application, your Honor. The question of the vested right, of course, was an important part of this litigation and I don't think the dismissal of that claim is mandatory here.

The Court: Well, lot me look into it. I'm not going to make that determination now.

Anything further? All right, thank you.

(Record closed)

APPENDIX F—Memorandum Opinion and Order of the United States, District Court, Southern District of New York, Dated October 22, 1990.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MARVIN H. GREENE and LAKE ANNE REALTY CORP.,

Plaintiffs,

against

TOWN OF BLOOMING GROVE, *et al.*,

Defendants.

87 Civ. 0069 (SWK)

APPEARANCES

For Plaintiff:

Marvin H. Greene and Lake Anne Realty Corp.
Payne, Wood & Littlejohn
Glen Cove, New York

By: Daren A. Rathkopf

For Defendants:
D'Amato & Lynch
New York, New York

By: Patrick J. Maloney

SHIRLEY WOHL KRAM, U.S.D.J.

In this civil rights case involving zoning, the parties have submitted post-trial motions. Presently before this Court is defendants motion to dismiss pendent state claims for lack of jurisdiction and plaintiffs' motion pursuant to Fed. R. Civ. P. 59 and 60 to amend the judgment. This Court had previously granted defendants motion for summary judgment in an opinion dated November 18, 1988. The Second Circuit reversed and remanded in part by an opinion dated July 17, 1989. Familiarity with these decisions assumed.

Discussion

Plaintiffs Marvin Greene and Lake Anne Realty Corp. ("Plaintiffs" or ("Greene") seek to have this Court declare that they have a vested right to develop an approximately 136 acre parcel in Blooming Grove, New York for use as a bungalow colony. Greene also seeks an injunction ordering the Building Inspector of the Town of Blooming Grove to issue to plaintiffs a permit for the first of such units as applied for, and directing the building inspector to issue future permits for which Greene may apply. Defendants argue that this court should not exercise pendent jurisdiction over the pendent claims at this time. Defendants add that the plaintiffs made no mention of the state law claims in its requested charges, in the special verdict form used by the Court or at the time that the jury returned its verdict.

The jury in this action was only instructed on Greene's civil rights claim pursuant to 42 U.S.C. § 1983, and any

remaining claims for declaratory or injunctive relief, as equitable claims, were not part of the jury charge. Plaintiff's § 1983 claim alleged that he had a vested right to develop the land in question and that the defendants had deprived him of that right in violation of 42 U.S.C. § 1983. Upon the consent of the parties, the Court submitted a special verdict form to the jury which included two questions, the first of which asked:

> 1. Does the vested non-conforming use of plaintiff's bungalow colony extend to the entire 136 acres previously approved for bungalow colony use?

Special Verdict Form dated February 14, 1990. The Jury responded affirmatively to this question but responded negatively to the next question, which was whether Greene had been denied his right to develop the 136 acres in violation of 42 U.S.C. § 1983. A judgment thereafter was filed indicating that the defendants prevailed on the § 1983 claim. Before determining whether the judgment may be amended to add a declaratory judgment and injunction, this Court must first consider defendants motion to dismiss these claims for lack of pendent jurisdiction.

I. Defendants Motion to Dismiss Any Pendant State claims

As a threshold determination, pendent jurisdiction over State claims only exists where the "federal and state claims in the case 'derive from a common nucleus of operative fact' and are such that '[a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.' " *Carnegie-Mellon University v. Cohill,* 108 S. Ct. 614, 618 (1988) (quoting *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966)). Here, any state claim relating to vested rights is unequivocally derived from a common nucleus of fact with the § 1983 claim, which itself required as an element the finding of vested rights. These claims are also

ones that a plaintiff would reasonably expect to be tried together. As a second step in the pendent jurisdiction analysis, the Court must decide whether it should exercise its discretion to take jurisdiction over the state law claims as pendent. *Gibbs, supra,* 383 U.S. at 725. In exercising this discretion, the Court must balance the following factors: judicial economy, fairness to the parties, avoidance of potential jury confusion, avoidance of unsettled issues of state law, the relative dominance of state and federal issues, and the degree of overlap of evidence relevant to the federal and state claims. *See Independent Banker Ass'n v. Marine Midland Bank,* 757 F.2d 453, 464 (2d Cir. 1985), *cert. denied,* 476 U.S. 1186 (1986)).

Under this two-part analysis, these state claims, if pleaded in the amended complaint and retained after remand in the pretrial order, would be pendent to the § 1983 claim. This conclusion is supported in particular by considerations of judicial economy and fairness to the parties because it would be unfair to require the parties to relitigate issues that had already been litigated before this Court. Even though the jury found in favor of defendant on the § 1983 claim, this Court would retain jurisdiction over any existing pendent state claims.

II. Plaintiffs motion to Amend the Judgment

The amended complaint in this action requested relief including:

> 3. Declaring that plaintiffs have a valid vested right to improve their bungalow colony by the addition of an additional 419 units in accordance with the provisions of the zoning ordinance in force prior to the adoption of the Zoning Ordinance of 1974 . . .

Affidavit of Daren Rathkopf, Esq. at 2. Additionally, the amended complaint generally sought such other and further relief as this Court may deem just and proper. The joint pre-trial order also requested such a declaration of vested rights. Rathkopf Affidavit at 3 (citing Joint Pre-Trial Order at 2 ¶ 4 (a)). Greene, however, did not specifically request injunctive relief in his amended complaint.

Sitting in diversity, this Court assumes the equitable powers of a New York state court. Based on the weight of credible evidence at trial and the jury's answer to question one of the special verdict form, the Court shall amend the judgment to include a declaration that plaintiff has a vested non-conforming use to build bungalow colonies that covers the entire 136 acres. The Court, however, shall not issue "directory" relief, as described by plaintiff, as such injunctive relief was not specifically before this Court at the time the jury entered its verdict. As a claim for injunctive relief was not before this Court, and therefore, not part of any pendent claim, this Court cannot now exercise jurisdiction over it. Furthermore, injunctive relief may not be necessary in light of this Court's declaratory relief, as there is no evidence that the defendants in this action shall decline to issue the requested permits in reliance on this amended judgment. If the defendants decline to issue building permits on the 136 acre parcel in question, plaintiff could then enforce this state law vested zoning right in state court.

Conclusion

For the aforementioned reasons, defendants motion to dismiss pendent claims for lack of jurisdiction is denied, and plaintiffs' motion to amend is granted in part and denied in part. The judgment entered in this action on February 28, 1990 is amended to add the following declaratory relief:

Marvin H. Greene has a valid vested right to improve the bungalow colony, to wit the approximately 136 acre parcel consisting of all of the tax lot designated as Section 18, Block 2, Lot 10 and a portion of the tax lot designated as Section 41, Block 1, Lot 3 on the Orange County Tax Map and being all of the property shown as within the bounds of the Lake Anne Country Club bungalow colony as shown on a map approved by the Planning Board of the Town of Blooming Grove in October 1960, by the construction of an additional 419 units conforming with the zoning restrictions applicable at the time bungalow colonies had been a permitted use prior to the adoption of the 1974 zoning ordinance.

Plaintiffs' motion to amend the judgment to enjoin the building inspector is denied.

SO ORDERED.

SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
October 22, 1990

APPENDIX G—Order of the United States Court of Appeals for the Second Circuit, Dated July 15, 1991, Denying a Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-fifth day of July, one thousand nine hundred and ninety-one.

MARVIN H. GREENE and LAKE ANNE REALTY CORP.,

Plaintiffs-Appellees/Cross-Appellants,

against

TOWN OF BLOOMING GROVE, SUPERVISORS and TOWN BOARD OF THE TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE and BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Defendants-Appellants/Cross-Appellees.

Docket Number 90-9025, 91-7043

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plain-

tiffs-Appellees/Cross-Appellants MARVIN H. GREENE and LAKE ANNE REALTY CORP.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

Filed Jul 25 1991
Elaine B. Goldsmith, Clerk
United States Court of Appeals
Second Circuit

(2)

No. 91-649

In The

Supreme Court of the United States

October Term, 1991

MARVIN GREENE and LAKE ANNE REALTY, CORP.,

Petitioners,

- against -

TOWN OF BLOOMING GROVE, SUPERVISOR AND TOWN BOARD OF TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE and BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. CULLEN
D'AMATO & LYNCH
Counsel of Record
for Respondents
70 Pine Street
New York, New York 10270
(212) 269-0927

WILLIAM P. LARSEN, III
Co-Counsel for Respondents

DONALD G. NICHOL
JACOBWITZ & GUBITS
Co-Counsel for Respondents
158 Orange Ave.
P.O. Box 367
Walden, New York 12586-0367
(914) 778-2121

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Does the United States District Court have pendent jurisdiction of a claim for equitable relief of declaratory judgment on a zoning claim based on state law as part of an action in which the plaintiff seeks relief under 42 U.S.C. §1983 for recovery of monetary damages and other relief, if:

a) The complaint does on specifically demand declaratory judgment based on a state law claim;

b) There is no separately identified claim for equitable relief of declaratory judgment stated under state law;

c) The Court of Appeals by its prior order has remanded the action to try the issue of the plaintiffs' specific disputed property right as an element of plaintiffs' claim under 28 U.S.C. 1983, but does not disturb the District Court's decision dismissing the only stated cause of action of declaratory judgment that could be interpreted as arising out of state law based on expiration of statute of limitations; and

d) The jury did not define the scope of plaintiffs' vested right and further found that the defendants had not deprived plaintiffs of any such property rights in violation 42 U.S.C. §1983?

2. Was it required for the Court of Appeals to strike such provision of the District Court's judgment which was amended pursuant to Civil Rule 60?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

This petition arises from an action commenced by the Plaintiffs/Petitioners Marvin Greene and Lake Anne Realty Corporation against Defendants/Respondents the Town of Blooming Grove, its Town Board, Supervisor, Inspector, Planning Board and Board of Zoning Appeals.

Blooming Grove is a small municipal corporation located in Orange County, New York. Petitioners are the owners of several large parcels of real property located in Blooming Grove. Included among Petitioners' holdings is a parcel of land of some 136± acres. Petitioners' amended complaint stated that of that 136± acres, on a 10± acre portion there are situated 123 cottage and motel style units. The remainder of the 136± acres is shown as a golf course and ski area on the approved plan. The Blooming Grove Code defines a bungalow colony as including "accessory recreational facilities".

After the construction of the existing "bungalows", in the 1950's and 1960's, Blooming Grove, in a valid exercise of its police power, enacted a zoning Ordinance which made "bungalow colonies" a non-conforming use. In addition, the Zoning Ordinance, adopted on October 7, 1974, provided for minimum lot sizes based on the density of construction which could safely be supported by the terrain. One type of zone, denominated as R-30, requires a minimum lot size of 30,000 square feet. On less hospitable terrain, the Ordinance established an R-80 zone which requires a minimum lot size of 80,000 square feet. There are in excess of one dozen separate R-80 zones in Blooming Grove.

On or about October 17, 1973, Petitioners applied to Blooming Grove for permission to construct 264 bungalow units in addition to the units already in place. At that time the Town denied the application based upon the belief that a town-wide building moratorium proscribed such new construction. Petitioners commenced a proceeding in state court to challenge the Town's determination. The Court directed the Town to consider Petitioners' application on its merits. During the pendency of the appeal of this decision, the Town amended its Zoning Ordinance to make "bungalow colonies" a non-conforming use. Based upon the Zoning Ordinance as amended, the Town again denied Petitioners' application to enlarge the "bungalow colony". Petitioners again sued in state court to compel the Town to grant the application. The Court ruled that applications were to be decided pursuant to the then-existing law.

On November 1, 1983 Petitioners sought a building permit to add an extra, unheated room onto several attached dwellings which Petitioners call "motel style units". Blooming Grove denied the application on November 21, 1983. Petitioners appealed the denial to the Zoning Board of Appeals which also denied the application.

On or about July 3, 1986 Petitioners applied for permission to build an additional 419 bungalow dwellings. No pre-existing approval for the 469 units was ever found in Blooming Grove's files. The existence of such an approved plan was not demonstrated by the petitioners. The latest approved plan showed the remainder of the 136 acres as a golf course.

On August 11, 1986, Petitioners applied for a building permit to renovate a certain building which they called a "hotel". The application sought permission to work on apartments, rooms, a luncheonette and cocktail lounge. The uses of the building's transient rooms, luncheonette and cocktail lounge had long since fallen into abandonment. However, since Petitioners were able to show that at least one apartment had been continuously rented, the Town issued a permit for the work on the apartments only.

On October 22, 1986, Petitioners were served with a summons for operating an illegal dump. This action is still pending before the Town Court of Blooming Grove. It is being prosecuted jointly by the New York State Department of Environmental Conservation.

These are the facts Petitioners alleged in the District Court that gave rise to claims of deprivation of constitutional rights in violation of 42 U.S.C. §1983.

After the parties filed cross-motions for summary judgment, the District Court in an Order dated November 18, 1988 granted summary judgment to Blooming Grove dismissing all of the eight causes of action alleged in the amended complaint (see Petition, Appendix B). On appeal, the Court of Appeals affirmed the dismissal of seven of the eight claims and remanded to the District Court the factual issue of whether Petitioners had a protectable property right under New York law, the deprivation of which could state a claim for relief under 42 U.S.C. §1983. *Greene v. Blooming Grove,* 879 F.2d 1061 (2d Cir. 1989). (See Petition, Appendix C.)

The District Court conducted a jury trial which commenced on February 5, 1990 and concluded on February 14, 1990. The jury was instructed by the Court on the elements of a cause of action for violation of 42 U.S.C. §1983. The jury then returned a unanimous verdict in favor of the Defendants/Respondents and against the Plaintiffs/Petitioners. The jury did not enter any verdict in favor of the petitioners/plaintiffs in accordance with the special instructions. Judgment for the Defendants/ Respondents was subsequently entered.

Thereafter, Petitioners moved pursuant to Federal Rules of Civil Procedure 59 and 60 to alter or amend the Judgment of dismissal entered on the jury verdict. The District Court granted that motion and amended the judgment to award declaratory relief to Petitioners stating that they have a vested right to extend a non-conforming use by adding 419 two bedroom houses to the 125 bungalows which presently exist on a 136± acre parcel of land in Blooming Grove. The Zoning Code (§30:46) requires an application to the Zoning Board of Appeals to expand a non-conforming use. The District Court failed to address why petitioners were not required to make such an application or why approval by the Town Planning Board (Zoning Code §30.44), State and County Health Department (New York Public Health Law) and the New York State Department of Environmental Conservation was not needed.

Petitioners commenced this action by service of a summons and complaint on January 6, 1987. Subsequently an amended complaint was filed on March 11, 1987 (Appendix). The amended complaint basically alleges that the Respondents are pursuing a course of

conduct depriving the Petitioners of their property without due process of law and depriving Petitioners of the equal protection of law in violation of the plaintiff's rights under the 5th and 14th Amendments of the Constitution, all in violation of 42 U.S.C. §1983. The amended complaint states eight causes of action. The causes of action that are relevant are the third cause of action and fourth cause of action, respectively. After the Court of Appeals' Order of July 17, 1989, all but the fourth cause of action were dismissed.

The third cause of action of the amended complaint alleges that the Petitioners applied to the Respondent Planning Board for approval for a revised map of its bungalow colony on October 17, 1973 which provided for an additional 264 bungalow units to be built. It was further alleged that the Respondent Planning Board refused to consider this application because of a moratorium on construction of single family dwellings in subdivisions and multiple dwellings in the Respondent Town of Blooming Grove. Thereafter a proceeding was brought by the Petitioners in the Supreme Court of the State of New York, Rockland County, which resulted in a decision that the moratorium was inapplicable to plaintiff's application, remanding the matter to the Planning Board for consideration of the acceptability of a revised survey map in accordance with the applicable zoning ordinance. A copy of this decision was included as an Exhibit to the amended complaint. The amended complaint also alleged that, while the Planning Board's appeal from that Order was pending, the Town adopted a Zoning Ordinance of 1974 which eliminated the provisions of the prior zoning ordinance which had allowed

the planned bungalow colony as a permitted use. The Planning Board's appeal was subsequently dismissed as moot.

It is further alleged in the amended complaint in the third cause of action that Petitioners appeared before the Planning Board and were informed that the Planning Board would not consider the acceptability of the revised map due to the new Zoning Law of 1974. In the additional proceedings before the Supreme Court of Rockland County, New York, the Petitioners sought to hold the Planning Board in contempt for failure to comply with the earlier Order of August 5, 1974. However, the Supreme Court, Rockland County, held that the Planning Board could not be held in contempt for a refusal to consider an application under the provisions of a zoning ordinance which no longer existed. The court, as part of its decision, stated that its holding was "without prejudice to any proper proceeding or action Petitioner may be advised to initiate to determine his 'vested rights' claim" (App. P. 36). The Petitioners alleged in their third cause of action in the amended complaint that the wilful, wrongful and deliberate delay by Respondents allowed the new Zoning Ordinance to be adopted and further that it did so in an unlawful attempt to defeat Petitioners' right to build their additional bungalows as set forth in its application. At the close of this third cause of action Petitioner stated that they were entitled to "a vested right to construct at least 264 additional units shown on such revised survey." (App. p. 9).

In the fourth cause of action set forth in the amended complaint, the Petitioners articulate an application for similar but different relief. In this cause of action the

Petitioners assert that under the prior zoning law it had devoted the 136 acres of its property to the bungalow colony use and had specifically improved 10 acres of the total parcel and had provided service infra-structure, such as clubhouse, pool and water systems, which was of sufficient capacity to accommodate the eventual completion of the development of the 136 acres of the planned bungalow colony use. Subsequent to the trial, the NYSDEC cited the petitioners for discharging sewage without a State Pollution Elimination Discharge Systems Permit. The proposed permit specifically limits petitioners to the exiting units. The Petitioners assert that with the adoption of the 1974 Zoning Ordinance its prior use became a "vested non-conforming use". Petitioners assert thereafter they submitted to the Respondent Building Inspector an application for building permits for an additional 419 bungalows to be added to the original 123 units of the bungalow colony. The Petitioners assert a right to issuance of a building permit on the basis of plaintiff's constitutionally vested rights to complete the development of a planned bungalow colony with the number of units allowed under the zoning ordinance prior to the adoption of the Zoning Ordinance of 1974. The petitioners fail to note that the maximum number of units is limited by the need to have an approved plan for recreational facilities. This fourth cause of action closes with the allegation that the Respondents' conduct "constitutes a deliberate and purposeful attempt to deprive plaintiffs of their property without due process of law, to take plaintiffs' property without the payment of just compensation and to deprive plaintiffs of their constitutionally protected rights in violation of the 5th and 14th

Amendments of the Constitution of the United States and 42 U.S.C. §1983." (App., p. 12.)

Prior to trial on this matter the District Court by Order of November 18, 1988 (Petition, Appendix B) granted the Respondents' motion for summary judgment and dismissed all of the plaintiffs' claims. On appeal to the Court of Appeals, this decision was affirmed with respect to all claims "except the claim that the vested nonconforming use of Greene's land as a bungalow colony extends to the entire 136 acres previously approved for bungalow colony use" as set forth in the decision rendered July 17, 1989 (Petition, pp. 1c-13c). The Court in its discussion of the earlier appeal by the Petitioners clearly indicated that their discussion involved the Petitioners' "appeal from a summary judgment dismissing *inter alia*, their claims under 42 U.S.C. §1983 . . . " (Petition, p. 2c) based on the Petitioners' allegations that they have been deprived of due process and equal protection under the Fourteenth Amendment by classifying a portion of its land under R-80 residential zoning rather than R-30 and, alternatively, that the Petitioners were deprived of property without due process by the Town's failure to recognize Petitioners' claim to a nonconforming bungalow colony use for the 135 acres designated as a bungalow colony as approved in the earlier map. With respect to these issues described in the Circuit Court's decision, the only matter which was remanded to the District Court was:

> On the question of whether Greene's vested nonconforming use as a bungalow colony should extend to the entire parcel, we reverse

> and remand for further proceedings because triable issues of fact are presented. (Petition, p. 3c).

The dismissal of all other claims in the amended complaint was affirmed by the Circuit Court.

The issue and cause of action that were remanded by the Circuit Court were tried before a jury in the District Court. The only factual issue with respect to allegations of property rights which was remanded to the District Court for determination, as a basis for any claim under 28 U.S.C. 1983, was that based on whether Petitioners' nonconforming use as a bungalow colony should extend to the entire parcel. It was this particular factual issue as to a claimed property right which formed the basis for a claim under 28 U.S.C. §1983 (in the fourth cause of action), and none other, which was remanded for trial to the District Court. There is no mention in the order of any claim based on state law for declaratory judgment or other equitable relief claimed by the Petitioners. The District Court's dismissal of the third cause of action based on statute of limitations defense was left undisturbed.

THE COURT OF APPEALS DECISION IN THIS §1983 ACTION IS CONSISTENT WITH PRIOR LAW ON PENDENT JURISDICTION

The Petitioners present arguments to the Court depicting the Court of Appeals' decision as one creating a conflict among the circuits and, most importantly, inconsistency with its own prior decisional law on the issue of pendent jurisdiction which in large part has been followed or adopted in other Circuits. The Court of Appeals' decision, however, is consistent and in harmony

with its prior law and the standard it has employed in determining the power and prudence of the federal courts exercising pendent jurisdiction in particular circumstances.

In *Leather's Best Inc. v. S.S. MORMACLYNX*, 451 F.2d 800 (2d Cir. 1976), a leading case on pendent jurisdiction in the Second Circuit, the Court permitted the exercise of pendent jurisdiction where a federal claim was asserted for loss of cargo under Admiralty Law against one defendant and a similar claim against its subsidiary co-defendant for the same loss, the latter of which the Court of Appeals found on appeal could be based solely on state law. The Court therein stated the two pronged test that must be utilized where the Court is asked to exercise pendent jurisdiction: to wit, whether the court has the power to hear a state claim; and whether, assuming the power, the court should hear the state claim as a matter of discretion. 451 F.2d 809. With respect to the question of power to hear a claim, the court must look to the "substantiality" of the federal issues and then inquire whether there is a "common nucleus of operative facts" sufficient to invoke pendent jurisdiction as well as determine if Congress has expressly or implicitly negated exercise of jurisdiction over such claims. *Leather's Best, Inc.*, 451 F.2d at 811. If the case hurdles the first obstacle, it must still be determined whether the case is appropriate, in the Court's discretion, to be heard by the court. The basis for the exercise of pendent jurisdiction "lies in the considerations of judicial economy, convenience and fairness to litigants." 451 F.2d 816; See *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976); *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

The Court of Appeals decision in this matter is consistent with the standards set for the exercise of pendent jurisdiction by the federal courts, even if the result is different here. In this action the Petitioners assert claims for recovery under 28 U.S.C. §1983, asserting eight causes of action in their complaint, seven of which were dismissed on summary judgment after appeal; the surviving cause was dismissed after trial by jury verdict. The Court of Appeals found that the district court did not have the power to hear the state claim since this claim was not properly pleaded. The circumstances found in *Leather's Best, Inc., supra,* such as an identity of the elements of the state claim as opposed to the federal claim actually tried, were not present to justify exercise of this jurisdiction. The Court of Appeals below specifically noted not only the failure of the Petitioners to plead a state claim for declaratory judgment, but also noted the fact that this question was first broached after judgment was entered and the failure to mention such claim at any stage where it would normally be raised, e.g. proposal of jury charges, the formulation of the special jury verdict form for submission to the jury or at the time of rendition of the verdict (Petition pp. 8a-11a). The Court of Appeals simply found that this matter does not meet the standards previously imposed by the courts. *Leather's Best, Inc.* must also be distinguished on a very simple but crucial fact. After it was determined that the claim against the defendant Tidewater was based in state law rather than Admiralty law, there still remained a federal claim in Admiralty (against the defendant carrier) and there was still a single nucleus of operative facts (i.e. the particular loss of the

cargo). *Leather's Best, Inc., supra,* is a particular application of pendent *party* jurisdiction, and its facts are not common or even analogous to this action.

Even if the Court of Appeals' analysis set forth in the opinion below is found to be insufficient, there are sufficient grounds to support the Court of Appeal's finding that the district court cannot exercise pendent jurisdiction in this matter. "Litigants cannot create federal jurisdiction by filing an insubstantial action under the civil rights statutes." *Studen v. Beebe,* 588 F.2d 560, 566 (6th Cir. 1978); *Burnett v. McNabb,* 565 F.2d 398 (6th Cir. 1977). With regard to claims brought pursuant to §1983, the courts have repeatedly held that if the federal claims are dismissed before trial, even though substantial in a jurisdictional sense, the state claims should be dismissed as well. See *Rogin v. Bensalem Township,* 616 F.2d 680 (3d Cir. 1980); *Ohio Inns, Inc. v. Nye,* 542 F.2d 673 (6th Cir. 1976); *Morse v. Wozniak,* 565 F.2d 959 (6th Cir. 1977); *United Beverage Co. of South Bend, Inc. v. Indiana Alcoholic Beverage Commission,* 760 F.2d 155 (7th Cir. 1985). The federal courts have carved out exceptions to the usually liberal application of pendent jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction over a pendent claim. *Bell v. Hood,* 327 U.S. 678, 682-83, 66 S.Ct. 773, 776-77, 90 L.Ed. 939 (1946); *Stephenson v. Esquivel,* 614 F. Supp. 986, 991 (D.N.Mex. 1985).

The question is then raised whether the district court may exercise pendent jurisdiction if a matter proceeds beyond summary disposition to where a trial or factual adjudication is held on the federal claim. The federal

court must, in certain circumstances, as are present here, abstain from the exercise of pendent jurisdiction over a state claim.

There is also a deference to the state courts in certain matters which have a greater impact on local interests that the state courts are better equipped to handle. One such interest is land use regulation. "Today the Supreme Court affords state and local governments broad latitude in enacting and implementing legislation affecting the use of land. Implicit in this deference is the recognition that land-use regulation generally affects a broad spectrum of persons and social interests, and that local political bodies are better able than federal courts to assess the benefits and burdens of such legislation." *Rogin v. Bensalem Township, supra,* at 697. A conventional attack on the constitutionality of zoning regulations is a matter to be resolved in state court. *City of East Lake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358 (1976); *Studen v. Beebe, supra.* Where federal claims are brought, including claims under 42 U.S.C. §1983, and are dismissed after a factual adjudication, pendent state claims in subject areas where the state has just such a strong interest will not be heard. See *Studen v. Beebe, supra* (where claims under 42 U.S.C. §§1983 and 1985 were dismissed after trial on the merits, zoning dispute claims must be heard by the state court of Ohio); *Manchester v. Lewis,* 507 F.2d 289 (6th Cir. 1974) (where federal claims under 42 U.S.C. §1983 are denied after full evidentiary hearing, state claims relating to teacher's tenure law cannot be heard); *Burnett v. McNabb, supra* (case heard on stipulation of facts and federal claims under 42 U.S.C. §1983 are dismissed, there is no pendent jurisdiction with regard to

claims brought under state beer licensing laws); and *Bates v. Dause*, 502 F.2d 865 (6th Cir. 1974) (where claims brought pursuant to 42 U.S.C. §1983 are dismissed after trial, claims under teachers' tenure law are dismissed for lack of pendent jurisdiction).

Vested rights must be determined in the first instance by the local board charged with enforcement of the zoning law. Matter of *Kadin v. Bennett*, 163 A.D.2d 308, 557 N.Y.S.2d 441 (2nd Dept., 1990); *Matter of G.M.L. Land Corp. v. Foley*, 21 A.D.2d 645, 246 N.Y.S.2d 338 aff'd 14 N.Y.2d 823, 251 N.Y.S.2d 472, 200 N.E.2d 455 (1964). In the present matter, plaintiff has not applied to, let alone received, a determination from the applicable administrative agency which under New York Law must determine vested rights. The Town of Booming Grove Zoning Code at §30.46(C) provides specifically that the expansion of a nonconforming use can only be approved upon application to the Town's Zoning Board of Appeals. Plaintiff has made no such application. Further, the Town's Zoning Code provides for site plan approval (Zoning Code §30.44). Plaintiff has made no application to the Planning Board for additional units for his bungalow colony subsequent to an application in 1973 which the Court ruled that the Planning Board was not required to consider.

Permitting the Court to determine the nature and extent of vested rights flies directly in the face of the Court's decision in *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). In that action the property owner obtained a jury verdict and award of

damages. The Supreme Court reversed holding the property owner's failure to seek a variance from the appropriate agency rendered the action unripe per judicial determination:

> As the Court has made clear in the recent decisions, a claim that the application of government regulations affects the taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application and the regulations to the property at issue . . . If the property owners were to seek administrative relief under these [variance] procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviously any need to address the constitutional questions. The potential for administrative solutions confirms the conclusion that the taking issue is simply not ripe for judicial resolution. [citations omitted] id. 473 U.S. at 187.

Thus, it is clear that it is totally improper for the District Court to issue declaratory judgment defining the nature and extent of the vested right which has not been considered by the local administrative agencies. In fact, such declaratory judgment is not supported by the jury verdict which did not address the scope, nature and/or extent of plaintiff's vested right. It is equally likely that the jury found that the vested right extending to the 136 acres was for the facilities including golf course and ski area as shown on the approved map rather than 419 units or simply that the jury merely answered the question "yes" in accordance with the instructions in order to reach the central issue of their determination, which was

whether or not the Town violated Plaintiff's rights. In fact, there is a logical inconsistency to assuming that the jury's answer to question number "1" indicated plaintiff's entitlement to 419 units. The jury then found the Town had not violated any rights of the plaintiff. Since the Town has not permitted the construction of the additional 419 units, the theory that the jury found an entitlement to those units does not follow.

It is clear as a matter of law that plaintiff lacks a plethora of approvals necessary to expand his bungalow colony by 419 units including, *inter alia*, approvals from the New York State Department of Environmental Conservation, the New York State Public Service Commission, the New York State Department of Health, the Orange County Department of Health and the Orange County Department of Transportation, as well as those needed from Town agencies. It defies logic for the District Court to issue declaratory judgment indicating a right to build a specific number of units where in fact the necessary approvals for such a project have not even been applied for.

Post-trial events clearly demonstrate the pitfalls of trying to determine zoning in a courtroom 75 miles from the municipality wherein the project will take place. The New York State Department of Environmental Conservation has cited plaintiff for operating the existing bungalow colony without any of the necessary permits for sewage disposal. The application for the necessary sewage disposal permit is still pending. The proposed permit limits the discharge to 22,600 gallons per day of sanitary wastewater. This proposed permit limits the size of the bungalow colony to the existing buildings. An addition of 419 units to the existing 125 would clearly cause major impacts which must be reviewed by the administrative agencies charged with the duty of reviewing

applications. It is not proper for the Court to declare rights without the necessary input from the state and local administrative agencies or, for that matter, the public itself. New York State Law requiring coordinated review among the many agencies and public notices of their actions would provide for a complete and thorough review, unlike the sequestered review of a single judge in a distant courtroom without the necessary facts to make such a determination. A consent order which the plaintiff has signed regarding its violations concerning sewage disposal, a matter which was not raised in the trial, clearly demonstrates the inappropriateness of declaratory judgment in this instance.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: New York, New York
November 15, 1991

JOHN J. CULLEN
Counsel of Record*
WILLIAM P. LARSEN, III
D'AMATO & LYNCH
for Respondents
70 Pine Street
New York, New York 10270
(212) 269-0927

DONALD G. NICHOL
JACOBWITZ & GUBITS
Co-Counsel for Respondents
158 Orange Ave.
P.O. Box 367
Walden, New York 12586-0367
(914) 778-2121

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

MARVIN H. GREENE and
LAKE ANNE REALTY CORP.,

Plaintiffs,

-against-

TOWN OF BLOOMING GROVE, SUPERVISOR AND TOWN BOARD OF THE TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE AND BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Defendants.

---X

AMENDED COMPLAINT

PLAINTIFFS DEMAND A TRIAL BY JURY

Case No. 87-Civ.-0069 SWK

Plaintiffs allege:

1. This court has jurisdiction over this action pursuant to 28 U.S.C. §1331 because it involves a federal question of law and arises under 42 U.S.C. §1983.

2. Plaintiff Lake Anne Realty Corp. is the owner of several parcels of real property situated in the Town of Blooming Grove, Orange County, State of New York.

3. Plaintiff Lake Anne Realty Corp. is a New York corporation which is and at all times hereinafter referred to was wholly owned by plaintiff Marvin H. Greene.

4. At all times hereinafter referred to the aforesaid parcels were owned by plaintiff Lake Anne Realty Corp., by plaintiff Marvin H. Greene or by some other corporation which was wholly owned by Marvin H. Greene.

5. Marvin H. Greene also sometimes conducts business under the trade name Lake Anne Country Club.

6. The word "plaintiffs" as used herein will refer to Marvin H. Greene, Lake Anne Realty Corp. or such other corporation wholly owned by Marvin H. Greene as may have been the then owner of the parcel referred to.

7. Defendant Town of Blooming Grove, a municipal corporation, is a political subdivision of the State of New York, located in Orange County, State of New York, and the other defendants are officers or boards of said municipality.

8. Defendants are pursuing a course of conduct which deprives plaintiffs of their property without due process of law and which deprives plaintiffs of the equal protection of the law in violation of plaintiffs' rights under the 14th Amendment of the Constitution of the United States, which takes plaintiffs' property for public use without just compensation in violation of plaintiffs' rights under the 5th Amendment of the Constitution of the United States, and which deprives plaintiff of his liberty and infringes upon plaintiffs' right to be secure against unreasonable searches and seizures as guaranteed

by the 14th Amendment to the U. S. Constitution, all of which is in violation of 42 U.S.C. § 1983.

9. Defendants are pursuing said course of conduct under color of state law viz. New York Town Law, Article 16 §§261-284, the New York State Uniform Fire Prevention and Building Code, and local law viz. the zoning ordinance and the subdivision regulations of the Town of Blooming Grove and the Code of the Town of Blooming Grove.

As and For a
First Cause of Action

10. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9 of this complaint.

11. On October 7, 1974 the defendant Town of Blooming Grove adopted the Zoning Map of the Town of Blooming Grove which established the boundaries of the districts or zones created by the Zoning Ordinance of 1974, later codified as Chapter 30, "Zoning" of the Town of Blooming Grove Municipal Code.

12. The aforesaid Zoning Map placed lands in an area lying between Clove Road and the boundary of the Town with the adjacent Town of Woodbury into two districts, an R-30 Residence District for the lands lying closer to Clove Road and an R-80 Conservation Residence District for the lands lying closer to the Town of Woodbury.

13. Plaintiffs own property which is included within said area.

14. Property within an R-30 Residence District may be used, inter alia, for single family detached dwellings on lots having a minimum lot area of 30,000 square feet with community sanitary or water plant and a minimum lot area of 40,000 square feet without community sanitary or water plant.

15. Property within an R-80 Conservation Residence District may be used, inter alia, for single family detached dwellings on lots having a minimum lot area of 80,000 square feet and the restrictions on the use of property within such district are otherwise more restrictive than the restrictions on the use of property within an R-30 Residence District.

16. Property in the Town of Blooming Grove is considerably less valuable when subject to the restrictions applicable within an R-80 Conservation Residence District than when subject to the restrictions applicable within an R-30 Residence District.

17. In so zoning the lands lying between Clove Road and the Town of Woodbury the defendant Town ran the dividing line between the R-80 and R-30 districts in a more or less straight line between the two districts but within plaintiffs' property the defendant Town, over plaintiffs' objections and for no apparent or explained reason, sharply diverted the direction of the line in such a way so as to include within the more restrictive R-80 district a portion of plaintiffs' property which would otherwise have been included within the R-30 district if the direction of the dividing line had not been so inexplicably diverted.

18. Although the portion of plaintiffs' property which is wrongfully included in the more restrictive R-80 district is about 35 acres, an additional area of about 35 acres belonging to a neighbor is also wrongfully included in the R-80 district, but this became known only as a result of recent surveys, the existing tax maps indicating that it was only plaintiffs' property which was wrongfully included in the R-80 district as a result of the aforesaid inexplicable veering of the district boundary line.

19. The inclusion of this 70± acre area within the R-30 district is not warranted by any proper planning or zoning considerations or any difference in the land so included from the land of others which was not so included.

20. The action of the defendant Town in including and maintaining the aforesaid 35± acres of plaintiffs' property within the R-30 district deprives plaintiffs of the due process of law and the equal protection of the law in violation of the 14th Amendment of the Constitution of the United States and 42 U.S.C. §1983.

As and For a
Second Cause of Action

21. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9 of this complaint.

22. Plaintiffs' [sic] also own a parcel of 136± acres which is used as a bungalow colony on a 10± acre portion of which there are situated 123 cottage and motel style units. A copy of plaintiffs approved planned bungalow colony map is annexed as Exhibit A.

23. On or about November 1, 1983 plaintiffs applied to the then Building Inspector of the Town of Blooming Grove for a building permit to allow the enclosure of the open porches of the dwelling units located in the three single story buildings containing the motel style units forming a part of plaintiffs' bungalow colony.

24. On or about November 16, 1983 said defendant orally denied such application and confirmed such denial in a letter dated November 21, 1983.

25. On November 28, 1983 plaintiffs appealed said action to the defendant Zoning Board of Appeals.

26. On February 8, 1984 defendant Zoning Board of Appeals denied plaintiffs any relief, refusing to allow the enclosure of said open porches.

27. Prior thereto the defendant Building Inspector had granted the applications of approximately twenty five other applicants for virtually identical permission to that requested by plaintiffs.

28. Subsequent thereto the defendant Zoning Board of Appeals granted the application of one John H. Ryan, Jr. as agent for the owners of the other properties for virtually identical permission to that requested by plaintiffs.

29. Upon information and belief plaintiffs are the only persons to whom the defendants have denied relief similar to that requested by plaintiffs.

30. The aforesaid actions constitute a deliberate and purposeful attempt by the defendants to deprive plaintiffs of the equal protection of the law and of their constitutionally protected rights under the 14th Amendment of the Constitution of the United States and is in violation of 42 U.S.C. § 1983.

As and For a
Third Cause of Action

31. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9 and paragraphs 11 and 22 of this complaint.

32. Prior to the adoption of the aforesaid Zoning Ordinance of 1974 the Plaintiffs' bungalow colony was a permitted use and its cottages and motel style units and other facilities were shown on a survey map approved by the defendant Planning Board as provided for in the zoning ordinance then in force. Said survey map is the aforesaid map annexed as Exhibit A.

33. On October 17, 1973 plaintiffs applied to the defendant Planning Board for approval of a revised map which showed an additional 264 bungalow units.

34. The defendant Planning Board refused to consider plaintiffs' application on the ostensible ground that it was within the purview of Local Law No. 1, 1972 adopted by the defendant Town which imposed a moratorium on the "construction of single family dwellings in subdivisions and multiple dwellings" and prohibited the issuance of building permits for the construction of dwellings in any subdivision for the term of the moratorium.

35. A proceeding brought by plaintiffs in the Supreme Court, Rockland County, resulted in a decision that the moratorium was inapplicable to plaintiffs application and the matter was remanded to the Planning Board for consideration of the acceptability of the revised survey map in accordance with the zoning ordinance. A copy of the court's decision in said action and the order entered pursuant thereto on August 5, 1974 is annexed as Exhibit B.

36. On October 7, 1974 while defendant Planning Board's appeal from the aforesaid order was pending the defendant Town adopted the aforesaid Zoning Ordinance of 1974, which eliminated the provisions of the prior zoning ordinance which allowed a planned bungalow colony as a permitted use.

37. On March 25, 1975 the appeal taken by defendant Planning Board to the Appellate Division of the New York Supreme Court was dismissed as moot on motion of the defendant Planning Board.

38. Thereafter, on or about May 21, 1975, plaintiffs appeared before the defendant Planning Board and were informed that said defendant would not consider the acceptability of the revised survey map due to the enactment of the Zoning Law of 1974.

39. A subsequent motion by plaintiffs to hold the defendant Planning Board in contempt for failure to comply with the aforesaid order of the Supreme Court entered August 5, 1974 was denied, the court determining that it was obligated to apply the law then in force and that the Planning Board could not be held in contempt for refusal to consider an application under the provisions of

a zoning ordinance which no longer existed. A copy of the court's decision and order is annexed as Exhibit C.

40. Although the court denied plaintiff relief, it did so "without prejudice to any proper proceeding or action petitioner may be advised to initiate to determine his 'vested rights' claim."

41. The defendant Planning Board willfully, wrongfully and deliberately delayed approval of plaintiffs' application so as to allow a new zoning ordinance to be adopted under which it would no longer have authority to approve such revised survey.

42. The defendant Planning Board willfully, wrongfully and deliberately delayed such approval in an unlawful attempt to defeat plaintiffs' right to build the additional 264 bungalow units shown thereon.

43. Upon information and belief the defendants wrongfully conspired to delay approval of plaintiffs' application for the aforesaid reasons.

44. By reason of such willful, wrongful and deliberate delay plaintiffs have a vested right to construct at least the 264 additional units shown on such revised survey.

As and For a
Fourth Cause of Action

45. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9, 11, 22 and 32 of this complaint.

46. The area devoted to the bungalow colony use is, as aforesaid, 136± acres, approximately ten acres of which

were improved by the existing 123 units and a service infrastructure consisting of a clubhouse, outdoor pool, indoor pool and water system.

47. The aforesaid infra-structure was constructed with sufficient capacity to accommodate the eventual complete development of the entire 136± acre parcel devoted to the planned bungalow colony use with the additional bungalows which would have been allowable at the time said infra-structure was provided.

48. The zoning ordinance prior to its amendment in 1974 permitted bungalows at a density of four units per acre and upon the adoption of the 1974 zoning ordinance, which no longer provided for bungalow colonies, said use became a vested nonconforming use.

49. The density of four units per acre allowed by the zoning ordinance prior to its amendment in 1974 allows the development of this 136± acre parcel with 544 units.

50. On or about July 3, 1986 plaintiffs submitted to the defendant Building Inspector of the Town of Blooming Grove an application for a building permit to permit the construction of the first of a proposed additional 419 bungalows to be added to the existing 123 units at the bungalow colony.

51. Together with the aforesaid application plaintiffs enclosed a map showing the proposed location of the additional units.

52. All area requirements applicable to a bungalow colony as specified in the zoning ordinance prior to its amendment in 1974 were observed.

53. With said application plaintiffs also submitted a legal opinion with regard to plaintiff's vested right to build additional bungalow colony units on the unused portion of the entire area which is devoted to the use. A copy of said opinion is annexed as Exhibit D. Also enclosed with said application was a letter from Eustance and Horowitz, professional engineers, confirming the fact that the infra-structure provided for the bungalow colony was for a bungalow colony of the proposed size.

54. On numerous occasions plaintiffs were advised by the respondent Building Inspector that plaintiffs' application was in the hands of the Town Attorney who would write a memorandum with regard to the right of the plaintiffs to the issuance of a building permit.

55. After nearly seven months had elapsed and numerous requests had been made for action the Town Attorney, on January 29, 1987, wrote said memorandum. In it he stated that he had made a diligent search for an approved map for a planned bungalow colony and planning board minutes indicating approval of such a map, that no such approval was ever given and that there is no vested right to use the premises as a planned bungalow colony.

56. The approved map for such use and the planning board minutes indicating approval of such map constitute important evidence of plaintiffs' right to use the aforesaid 136± acres as a planned bungalow colony.

57. The planning board minutes of the meeting at which the planning board approved said map and the map itself with the approval of the planning board

endorsed thereon were both in the Towns files about two years ago.

58. On information and belief the defendants or some of them purposely removed said records from the Town's files with the intention of preventing plaintiffs from proving facts necessary to establish the existence of the planned bungalow colony as a vested non-conforming use or the existence of certain facilities within said bungalow colony as elements of the bungalow colony as the same had been approved by the planning board.

59. The defendant Building Inspector has not issued or denied a building permit.

60. Plaintiffs have a right to the issuance of a building permit on the basis of plaintiffs' constitutionally vested rights to complete the development of its planned bungalow colony with the number of units allowed under the zoning ordinance prior to the adaption of the Zoning Ordinance of 1974.

61. The aforesaid continuing course of conduct by the defendants constitutes a deliberate and purposeful attempt to deprive plaintiffs of their property without due process of law, to take plaintiffs' property without the payment of just compensation and to deprive plaintiffs of their constitutionally protected rights in violation of the 5th and 14th Amendments of the Constitution of the United States and 42 U.S.C. §1983.

As and For a
Fifth Cause of Action

62. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 61 of this complaint.

63. On or about October 24, 1985 plaintiff Marvin H. Greene entered into a conditional contract with the Estate of Carl Bartels to purchase a parcel of real property situated in the defendant Town of Blooming Grove.

64. Said contract was conditional upon said plaintiff's securing the approval of the defendant Planning Board for a subdivision of that parcel from other property owned by the Estate of Carl Bartels and upon the Planning Board's approval of access to said parcel over an existing improved road known as Evergreen Lane.

65. The logical and appropriate access to said parcel is over Evergreen Lane.

66. The defendant Planning Board refuses to allow Evergreen Lane to be used for such access and refuses to grant approval of the subdivision unless plaintiff Marvin H. Greene abandons his plan to provide access over Evergreen Lane and agrees to merge the proposed parcel to be acquired from the Estate of Carl Bartels with an adjacent parcel owned by the Lake Anne Realty Corp. thereby precluding plaintiff Marvin H. Greene from developing said parcel to be acquired from the Estate of Carl Bartels as a separate parcel or subsequently selling it as a separate parcel although both said parcels are in all respects suitable for development as separate parcels.

67. Such refusal is unnecessary to effectuate any of the purposes for which the defendant Planning Board was granted the authority to approve subdivision plats.

68. The defendant Planning Board in refusing to allow the use of Evergreen Lane as the means of access to the parcel and requiring the merger of the adjacent parcel owned by plaintiff Lake Anne Realty Corp. has caused plaintiffs substantial harm, has deprived plaintiffs of the due process of the law and the equal protection of the law in violation of the 14th Amendment of the Constitution of the United States and in violation of plaintiffs' civil rights protected by 42 U.S.C. § 1983.

69. In addition, the defendant Planning Board requires the plaintiffs to comply minutely and strictly with the technical requirements for subdivision approval in a manner which said board does not require of other persons seeking subdivision approval of comparable properties within the Town of Blooming Grove.

70. The defendant Planning Board subjects the plaintiffs to unreasonable and unnecessary delays in processing applications to which plaintiffs are applicants or interested parties and attempts to impose unreasonable and discriminatory requirements as a condition of granting subdivision approval.

71. The plaintiff Marvin Greene is treated by all the defendants as a second class citizen, not accorded the common courtesy which is accorded residents and other property owners within the Town and whose constitutional rights are disregarded by the defendants whenever an opportunity to do so arises.

72. The defendants have been and are engaged in a course of action by which they intentionally and purposely discriminate against the plaintiffs, engaging in unfair and discriminatory conduct purposefully directed towards them.

73. There is no rational basis for defendants' discrimination against plaintiffs.

As and For a
Sixth Cause of Action

74. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9, 11, 22 and 32 of this complaint.

75. Prior to the Planning Board's aforesaid October 28, 1960 approval of plaintiffs' revised Bungalow Colony Map, a copy of which is annexed as Exhibit A, plaintiffs operated a Bungalow Colony and operated a hotel containing a cocktail lounge in their bungalow colony.

76. Said hotel is labeled Building 1A on the aforesaid approved Bungalow Colony Map.

77. The schedule on the upper left side of said approved Bungalow Colony Map shows that Building 1A contains "3 units & 6 bedrooms & lobby, cardroom, luncheonette, cocktail lounge."

78. After the aforesaid approval of plaintiffs' revised Bungalow Colony Map the plaintiffs continued to operate said hotel as part of their approved bungalow colony and the cocktail lounge as part of said hotel.

79. On or about December 1984 plaintiffs started to make necessary repairs to the building and to redecorate

and completely refurbish the building, which had become run-down while being previously operated by a tenant.

80. On or about August 11, 1986 plaintiff Marvin H. Greene, during the course of said refurbishing, applied to the defendant Building Inspector for a building permit to allow the installation of certain plumbing fixtures.

81. In said application said plaintiff described the intended use of the building in a way similar to the way the use of the building was described on the approved Bungalow Colony Map, viz. as "Apts, Rooms, Luncheonette, Cocktail Lounge."

82. In August 1986 the defendant Building Inspector issued the requested permit, and plaintiffs installed said plumbing fixtures and continued to redecorate, refurnish and refurbish the hotel.

83. Plaintiffs even installed a new fireproof ceiling in the assembly room, one of the rooms of said hotel, at the direction of the Building Inspector who was present from time to time during the progress of the work and took part in conversations during which the building's use was described as that of a hotel, with no demur on the part of said defendant.

84. In a variety other ways, as well, the defendants were made aware that plaintiffs intended to reopen the building as a hotel upon the completion of renovations, and defendants never claimed that the right to use the building as a hotel had been lost, except as stated below.

85. In September 1986, while the building was undergoing renovation, the defendant Building Inspector informed plaintiff Marvin H. Greene that in her opinion

plaintiffs no longer had the right to sell liquor because that use had been abandoned or discontinued.

86. Plaintiff Marvin H. Green then called to the attention of said defendant a case decided in the New York Supreme Court, Appellate Division, Second Department, entitled Gauthier v. Village of Larchmont, 30 A.D.2d 303, 291 N.Y.S.2d 584, in which the court held that the resumption of liquor sales after a hiatus of six years in a nonconforming hotel was not an extension of the nonconforming use, as the resumption of liquor activity did not cause a fundamental change in the principal nonconforming use of the property as a hotel.

87. Thereafter, and on or about December 1986, the defendant Town was notified by the State of New York, Division of Alcoholic Beverage Control that plaintiff Marvin H. Greene had applied to said Division for a liquor license for the premises, the prior license having previously lapsed.

88. The defendant Building Inspector thereupon claimed that the hotel itself had been abandoned and the Town's attorneys wrote to the Division of Alcoholic Beverage Control that use of the premises as a hotel and bar had been abandoned for a period of time sufficient to preclude the premises being considered a valid nonconforming use and that the building permit issued by the building inspector had been issued to permit the alteration of apartments.

89. On or about January 20, 1987 the defendant Building Inspector issued to plaintiff Marvin H. Greene an Order to Remedy Violation on the grounds that a hotel

is not a permitted use in the R-40 zone in which the building is situated.

90. At no time prior to December 1986 did any of the defendants claim that plaintiffs no longer had a right to operate the building as a hotel, such claim being made only after the defendants learned that a hiatus in the accessory sale of liquor in a non-conforming hotel would not prevent the resumption of the sale of liquor.

91. There is no merit to defendant Building Inspector's claim that plaintiff's hotel use had been abandoned or discontinued.

92. Sometime prior to February 4, 1987 the defendant Building Inspector, without the plaintiffs' knowledge or consent, crossed out so much of the aforesaid application of Marvin H. Greene for a building permit as included the words "luncheonette" and "cocktail lounge" in the statement of intended use so as to leave only the words "Apts. Rooms".

93. The Town of Blooming Grove Zoning Ordinance defines a hotel as "a building or part thereof which has a common entrance, common heating system, and general dining room, and which contains seven or more living and sleeping rooms designed to be occupied by individuals or groups of individuals for compensation".

94. Upon information and belief the defendant Building Inspector wrongfully and maliciously altered plaintiff Marvin H. Greene's application for a building permit in order to be able to deny that she issued to him a building permit for a hotel use or for a cocktail lounge use.

95. Upon information and belief the defendant Building Inspector took said action and denies plaintiffs' right to a continuation of a non-conforming use of the building as a hotel in a malicious attempt to deprive plaintiffs of vested rights guaranteed them by the due process clause of the 14th amendment to the U.S. Constitution.

96. Upon information and belief defendant Building Inspector conspired with the defendants Supervisor and Town Board of the Town of Blooming Grove in seeking to thus deprive plaintiffs of said vested rights.

97. Plaintiffs have suffered and will suffer substantial monetary loss as a result of defendants aforesaid wrongful acts.

As and For a
Seventh Cause of Action

98. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9 of this complaint.

99. A secluded and remote portion of plaintiffs' property within the Town of Blooming Grove is used by plaintiffs as a dump for "clean" debris such as construction debris and similar materials but not for garbage or other noxious or deleterious materials.

100. Said use has been in continuous use for over 35 years and constitutes a vested nonconforming use of plaintiffs' property.

101. On the 22nd day of October, 1986, defendant Building Inspector issued to the plaintiff Marvin H. Green a criminal summons for alleged violations of the

New York State Uniform Fire Prevention and Building Code and the Minicipal [sic] Code of the Town of Blooming Grove and thereafter filed in the Justice Court of the Town of Blooming Grove five criminal informations with respect to the alleged violations.

102. Said plaintiff was obliged to and did appear in said Justice Court to answer said alleged changes.

103. Said acts of defendant Building Inspector, were wrongful, unlawful and malicious, and constituted a false arrest of the said plaintiff.

104. Said Building Inspector knew, or a reasonable investigation by her would have revealed, that the said charges were without any substance, in fact or in law.

105. As a result of said acts said plaintiff was deprived of his liberty and was made ill and was and still is the subject of ridicule, scorn and derision, and was otherwise greatly damaged and injured in his good name and reputation in the community.

106. By said actions defendant Building Inspector deprived said defendant of his liberty in violation of the 14th Amendment of the U.S. Constitution and 42 U.S.C. § 1983.

As and For an
Eighth Cause of Action

107. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 9 and 99 through 106 of this complaint.

108. Prior to the commencement of criminal proceedings against plaintiff Marvin H. Greene in which said plaintiff is charged with violations because of plaintiffs' continued operation of the aforesaid dump the defendant Building Inspector without plaintiffs' consent and without a search warrant entered upon said property for the purpose of gathering evidence to be used against plaintiff Marvin H. Greene.

109. Said action by said defendant infringed on plaintiffs' right to be secure against unreasonable searches or seizures as guaranteed by the 4th Amendment to the U.S. Constitution and violates said 4th Amendment of the U.S. Constitution and 42 U.S.C. § 1983

Wherefore plaintiffs demand judgment against the defendants as follows:

1. In the sum of $10,000,000 pursuant to the provisions of 42 U.S.C. § 1983 together with costs including reasonable attorneys fees pursuant to 42 U.S.C. § 1988.

2. Declaring that the R-80 Residence District classification of plaintiffs' approximately 35 acres which were zoned as within such district instead of within an R-30 Residence District because of the diversion of the course of the dividing line between the two districts is invalid and unconstitutional and directing the defendant Town to reclassify said area as part of the R-30 Residence District.

3. Declaring that plaintiffs have a valid vested right to improve their bungalow colony by the addition of an additional 419 units in accordance with the provisions of the zoning ordinance in force prior to the adoption of the

Zoning Ordinance of 1974 as shown on the map submitted with plaintiffs' application for a building permit and directing the defendant Building Inspector to issue to plaintiffs a permit for the first of said units as applied for.

4. Declaring that plaintiffs have a valid vested right to operate the hotel which is identified as Building 1A on plaintiffs' approved bungalow colony map and as part thereof to operate a cocktail lounge for the serving of alcoholic beverages and declaring that the Order to Remedy Violation issued by the defendant Building Inspector on January 20, 1987 relating to said hotel is void and of no effect.

5. Directing the defendant building inspector to issue a building permit to allow the enclosure of the open porches of the dwelling units located in the three single story buildings containing the motel style units forming a part of plaintiffs' bungalow colony.

6. Directing the defendant Planning Board to allow the use of Evergreen Lane for access to the parcel proposed to be subdivided from other property owned by the Estate of Carl Bartels.

7. Enjoining defendants from violating plaintiffs' rights under the United States Constitution.

8. Granting such other and further relief as this court may deem just and proper.

PAYNE, WOOD & LITTLEJOHN
By /s/ Daren A. Rathkopf
Daren A. Rathkopf
A member of the firm
Attorneys for Plaintiffs
139 Glen Street
Glen Cove, New York 11542
(516) 676-0700

EXHIBIT B, ANNEXED TO AMENDED COMPLAINT – DECISION OF KELLY, J., DATED JULY 17, 1974 (Pages 30a-37a).

SUPREME COURT: ROCKLAND COUNTY

----------X

IN THE MATTER OF THE APPLICATION OF MARVIN GREENE,

Petitioner,

INDEX No. 1173/74

-against-

THE PLANNING BOARD OF THE TOWN OF BLOOMING GROVE, ORANGE COUNTY, NEW YORK, AND WILLIAM J. BROWN, TOWN CLERK OF BLOOMING GROVE,

Respondents.

----------X

THEODORE A. KELLY, J.:

This is an application by petitioner pursuant to CPLR, Article 78 to direct respondent Planning Board to approve a certain survey map submitted by petitioner pursuant to Section 7-A-10.01 of the Zoning Ordinance of the Town of Blooming Grove, or, in the alternative, directing respondent Town Clerk to issue a certificate approving said map pursuant to Section 176 of the Town Law.

Petitioner owns and operates a bungalow colony on a 136 acre parcel of land in the Town of Blooming Grove. The facility includes 123 cottage and motel style units, an outdoor pool, an indoor pool, a dining room and kitchen facility and a golf course.

A "planned bungalow colony" is a use permitted by Section 7-A-10 of the Zoning Ordinance of the Town of Blooming Grove. The term "planned bungalow colony" is defined by Section 3-B-500 of the Zoning Ordinance as a "tract of land under single ownership with buildings or structures designed in its entirety with rental cottages or dwelling units, to be used on a seasonal basis during the non-winter months, and including accessory recreational facilities listed in Section 7-A-10, for use only by residents of said planned bungalow colony and their guests."

Section 7-A-10 of the Zoning Ordinance also permits the development of additional bungalow facilities subject to certain enumerated conditions, one of which is as follows:

> "7-A-10.01 A survey map showing the location of all existing and proposed buildings and structures, including utilities, shall be prepared by the owner and three (3) copies filed with and approved by the Planning Board of the Town of Blooming Grove."

On December 4, 1972 the Town of Blooming Grove adopted a local law designated as "Local Law No. 1, 1972" which imposed a moratorium on the "construction of single-family dwellings in subdivisions and multiple dwellings" and prohibited the issuance of building permits for the construction of dwellings in any subdivision for the term of the moratorium.

On October 17, 1973 petitioner filed a survey map with the Planning Board of the Town of Blooming Grove. The map indicated the location of all existing and certain

proposed buildings and structures on petitioner's property. Petitioner requested approval of this map in accordance with Section 7-A-10 of the Zoning Ordinance. On January 9, 1974 petitioner was advised that the Planning Board would not consider the application since it was within the purview of the moratorium imposed by Local Law No. 1.

Petitioner alleges that a "planned bungalow colony" is not a subdivision or a multiple dwelling and is, therefore, not subject to the subdivision regulations of the Town of Blooming Grove or to the moratorium imposed by Local Law No. 1. He contends, therefore, that the Planning Board's refusal to consider his application for approval of the survey map was arbitrary and capricious. Should this Court determine that the Planning Board acted properly, then petitioner alternatively seeks an order directing respondent Town Clerk to issue a certificate approving the survey map on the ground that the Planning Board failed to hold a public hearing on the application and failed to take any action thereon within 45 days in violation of Section 276 of the Town Law.

There has been no opposition to the application submitted by the Panning Board and no explanation for the failure to have submitted such opposition. Respondent Brown has answered the petition and has interposed the following defenses:

(a) That the petitioner has failed to properly designate the Planning Board as a party respondent herein in that petitioner has failed to designate each member of the Planning Board as a respondent.

(b) That petitioner has failed to exhaust his administrative remedies by neglecting to apply for pre-application sketch approval or for preliminary subdivision approval or to pay the required fees therefor.

(c) That the relief requested by petitioner requires subdivision approval under Sections 207, 300, 400 and 500 of the Subdivision Regulations of the Town of Blooming Grove and that the Town, by the enactment of Local Law No. 1, has imposed a moratorium of such applications.

It is clear, therefore, that the principal issue presented for the Court's determination is whether petitioner's application constituted an application for subdivision approval, which would make it subject to the Town's Subdivision Regulations and the moratorium, or whether the application was exempt from the Subdivision Regulations and the moratorium.

Initially, the Court finds no merit to Brown's contention that the petition failed to properly designate the Planning Board as a party respondent. CPLR, Rule 2101, subd. f requires that the title of an action include the names of all parties. However, Rule 2101, subd. f permits the Court to disregard a defect in the form where a substantial right of a party is not prejudiced. It further provides that the party upon whom such paper is served shall be deemed to have waived an objection to any defect in form unless, within two days after the receipt thereof, he returns the paper to the party serving it with a statement of the particular objection.

The affidavit of service submitted by petitioner herein indicates that the petition and notice of petition

were served upon the Clerk of the Planning Board. The Planning Board has made no objection to the form of the petition and notice of petition. Hence, the objection as to form is deemed waived under Rule 2101, subd. f. Additionally, the Court finds that the alleged defect would not prejudice any substantial right since it should have been obvious to the Planning Board that it was the official body against which petitioner's application was directed.

As a second affirmative defense to the petition, Brown alleges that petitioner has failed to exhaust his administrative remedies as a prerequisite to this proceeding. Specifically, he alleges that petitioner failed to apply for pre-application sketch approval or for preliminary subdivision approval and to pay the fees therefor as required by the Subdivision Regulations of the Town of Blooming Grove. He further contends that the application filed by petitioner for the approval of the Planning Board was not a "survey map" within the meaning of Section 7-A-10.01 of the Zoning Ordinance.

Brown's second affirmative defense is predicated upon his contention that petitioner's planned bungalow colony is a subdivision. If the planned bungalow colony is not a subdivision then there would be no necessity for petitioner to file for preliminary subdivision approval. There would also be no necessity for petitioner to apply for site plan approval since Section 7-E-10 of the Zoning Ordinance exempts a planned bungalow, a use permitted by Section 7-A of the Ordinance, from the requirement of site plan approval. A finding in petitioner's favor on this issue would also be determinative of the third affirmative defense asserted by Brown wherein he alleges that the

planned bungalow colony is subject to the moratorium imposed by Local Law No. 1.

Section 7-A-10 et seq. of the Zoning Ordinance expressly provided for the expansion of an existing bungalow colony. There is nothing in these sections to indicate that the proposed plan of expansion must comply with the Town Subdivision Regulations. The only reference to the Subdivision Regulations is found in Section 7-A-10.05 of the Zoning Ordinance wherein it is expressly provided, in part, as follows:

> "A planned bungalow colony may only be sold or offered for sale in its entirety, except that if sale or subsequent sale of dwelling units is contemplated, the site plan of the development shall conform to the subdivision regulations of the Town of Blooming Grove and site improvements shall be in accordance with the standards set forth therein * * * ."

Had the Town of Blooming Grove intended to subject a planned bungalow colony to the Subdivision Regulations, then an express provision for compliance should have been made rather than a limitation of compliance only to situations where a sale or subsequent sale was contemplated. There has been no evidence submitted herein to show that petitioner contemplated such a sale or subsequent sale when he filed the survey map with the Planning Board. The Court, therefore, finds no requirement that petitioner's application be presented for subdivision approval and no requirement that the plan comply with the Subdivision Regulations. In view of the Court's determination that petitioner is not required to comply with the Subdivision Regulations, it then follows that the

plan would not be subject to the moratorium which was expressly imposed upon the "construction of single-family dwellings in subdivisions and multiple dwellings." The Court, accordingly, finds no merit to the second and third affirmative defenses.

While the Court finds no merit to the affirmative defenses set forth in the answer, it will make no determination as to the sufficiency of the survey map filed by petitioner with the Planning Board. Petitioner alleges that the map complies with all the requirements of the Zoning Ordinance. Any determination as to sufficiency, however, may only be made by the Planning Board under Section 7-A-10.01 of the Zoning Ordinance. On the present state of the record there is no indication that the Planning Board considered the merit, if any, of petitioner's survey map. The Planning Board, rather, refused to consider the application on the ground that it fell within the purview of the moratorium.

The application, accordingly, is granted to the extent that petitioner's application for approval of the survey map is remanded to the Planning Board which shall consider the acceptability or the non-acceptability of said map in accordance with Section 7-A-10 et seq. of the Zoning Ordinance. Since the application is being remanded to the Planning Board, there is no necessity to consider petitioner's demand for alternative relief.

Submit order on notice.

/s/ Theodore A. Kelly
J.S.C.
HON. THEODORE A. KELLY
Justice Supreme Court

Dated: New City, New York
July 17, 1974

Gilman, Gilman & Goldstein, Esqs.
Attorneys for Petitioner, By Bernard Stanger, Esq.,
of Counsel.
16 Orchard Street
Middletown, New York 10940

William J. Brown, Town Clerk
Town of Blooming Grove
by Gerard N. Jacobowitz,
37 Main Street
Walden, N.Y. 12586

TO: Planning Board
Town of Blooming Grove
Town Hall
Blooming Grove, New York

EXHIBIT B (CONTINUED) – ORDER OF KELLY. J., DATED JULY 31, 1974

At a special Term of the Supreme Court held in and for the County of Rockland at the Courthosue, New City, New York, on the 31st day of July, 1974.

PRESENT:

HON. THEODORE A. KELLY,
Justice of the Supreme Court.

----------X

IN THE MATTER OF THE APPLICATION OF MARVIN GREENE,

Petitioner,

-against-

THE PLANNING BOARD OF THE TOWN OF BLOOMING GROVE, ORANGE COUNTY, NEW YORK, and WILLIAM J. BROWN, TOWN CLERK OF BLOOMING GROVE,

Respondents.

ORDER

Index No. 1173/74

On reading and filing the petition herein duly verified the 1st. day of February, 1974, praying for an order and judgment directing the Planning Board of the Town of Blooming Grove, Orange County, New York, to review and approve survey maps submitted by Petitioner and all the exhibits annexed thereto, and the verified answer of

the respondent, William J. Brown, Town Clerk, in opposition thereto, dated the 26th. day of February, 1974, and this matter having been fully submitted to the court and due deliberation having been had, and the court having made its memorandum dated the 17th. day of July, 1974, and having caused the same to be filed herein,

NOW, ON MOTION of JACOBOWITZ AND GUBITS, ESQS., attorneys for respondents, it is

ORDERED AND ADJUDGED, that the application of the Petitioner is granted to the extent that Petitioner's application for approval of the survey map is remanded to the respondent Planning Board, which shall consider the acceptability or non-acceptability of said map in accordance with the terms of Section 7-A-10 et seq. of the Zoning Ordinance..

ENTER:

/s/ Theodore A. Kelly
Justice of the Supreme Court
HON. THEODORE A KELLY
Justice Supreme Court

EXHIBIT C, ANNEXED TO AMENDED COMPLAINT – DECISION AND ORDER OF SILBERMAN, J., DATED SEPTEMBER 23, 1975 (Pages 40a-43a).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

----------X

MARVIN GREENE,

Petitioner,

Index
1173/74

-against-

THE PLANNING BOARD OF THE TOWN OF BLOOMING GROVE, ORANGE COUNTY, NEW YORK, AND WILLIAM J. BROWN, TOWN CLERK OF BLOOMING GROVE,

Respondents.

----------X

MORTON B. SILBERMAN, J.

Petitioner in this article 78 proceeding moves to punish respondents for contempt for their alleged failure to comply with an order of this Court (KELLY, J.) dated July 31, 1974.

The dispositive facts are not in dispute: In and about October, 1973 petitioner applied to the Planning Board of the Town of Blooming Grove for approval of a certain "survey map" which depicted the location of all existing and proposed structures on petitioner's bungalow colony premises. Such application was made pursuant to section 7-A-10 of the 1953 Zoning Ordinance of said Town. The Planning Board refused to entertain the application upon the grounds that consideration thereof was precluded by

the "stop-gap" ordinance enacted by the Town (Local Law No. 1 of 1972), pending the adoption of a new zoning ordinance.

Petition then brought the within article 78 proceeding. In a decision dated July 17, 1974, Mr. Justice KELLY concluded that the aforesaid stop-gap ordinance was inapplicable to petitioner's said application. Accordingly, in an order dated July 31, 1974, Mr. Justice KELLY directed that "Petitioner's application for approval of the survey map is remanded to the respondent Planning Board, which shall consider the acceptability or non-acceptability of said map in accordance with the terms of Section 7-A-10 et seq. of the Zoning Ordinance [of 1953]."

Respondents appealed from the foregoing order on August 8, 1974. Thereafter, and on or about October 7, 1974, the Town repealed the 1953 Zoning Ordinance and enacted in its place the Town of Blooming Grove Zoning Ordinance of 1974.

In March, 1975 respondents moved in the Appellate Division for an order dismissing their appeal as academic, since the stop-gap ordinance in question had expired and since the 1953 Zoning Ordinance, under which petitioner's application had been made, was superseded by the 1974 Zoning Ordinance. The Appellate Division granted the motion to dismiss in an order dated March 25, 1975.

In and about May, 1975 petitioner appeared before the Planning Board in an effort to obtain approval of his survey map. The Planning Board denied the application in a decision dated May 27, 1975, for the following stated reason: "We find the application to be in violation of the

provisions of the Town of Blooming Grove Zoning Ordinance of 1974, and accordingly, must reject the application."

On the within contempt application, petitioner contends that the Planning Board is required to consider his application under the provisions of the 1953 Zoning Ordinance, in accordance with Mr. Justice KELLY'S aforementioned order, notwithstanding the fact that subsequent to such order the 1953 Zoning Ordinance was repealed and superseded by the 1974 Zoning Ordinance.

It is fundamental that a Court is required to resolve zoning disputes under the zoning ordinance as it exists at the time of decision. Stated another way, the Court is bound by intervening amendments to the zoning ordinance. (See: *Matter of Demissay, Inc. v. Petito,* 31 N Y 2d 896, and authorities cited therein; *Matter of Arcelo Reproduction Co., Inc. v. Modugno,* 31 A D 2d 642.) Accordingly, this Court may not punish respondents for an alleged contempt which consists of a refusal to consider an application under the provisions of a zoning ordinance which no longer exists.

Petitioner's application to punish respondents for contempt is denied. Such denial is without prejudice to any proper proceeding or action petitioner may be advised to initiate to determine his "vested rights" claim.

So ordered.

ENTER:

/s/ Morton B. Silberman
Justice Supreme Court

Dated: New City, New York
September 23, 1975.

Attorneys for petitioner: Gilman, Gilman & Goldstein, Esqs.,
40 Dunning Rd.,
P.O. Box 443,
Middletown, N.Y. 10940

Attorneys for respondents: Jacobowitz & Gubits, Esqs.,
158 Orange Ave.,
Walden, N.Y. 12586

ENTERED SEP 26 1975
1:08 P.M.
/s/ August H. Hansen, CLERK

EXHIBIT D, ANNEXED TO AMENDED COMPLAINT – JUNE 10, 1986 LETTER OF DAREN A. RATHKOPF (Pages 44a-46a).

LAW OFFICES OF
PAYNE WOOD & LITTLEJOHN
130 GLEN STREET
GLEN COVE, N.Y. 11542

(916) 676-0700

June 10, 1986

Mr. Marvin Greene
1783 Flatbush Avenue
Brooklyn, New York 11210

Re: Lake Anne Country Club
Bungalow Colony

Dear Mr. Greene:

You have advised me that the Town of Blooming Grove planning board approved a map showing a total of 136± acres as the area of the above referenced bungalow colony, a use which because non-conforming upon the adoption of an amended zoning ordinance in 1974. You have further advised me that although an area comprising about 10 acres of the approved 136 acres was developed with 125 units, the additional acreage is sufficient for an additional 419 units which you propose to build under the area restrictions which governed planned bungalow colonies. You have also informed me that prior to the amendment of the ordinance you had built a clubhouse, swimming pools and water system designed for the complete development of the use.

You have asked me whether you have a vested right to complete the proposed development by adding the remainder of the units originally contemplated, for which there is room on the site, and for which you have already provided the service facilities. In my opinion you are entitled to complete the development as proposed.

A similar issue was involved in United Citizens of Mount Vernor v. Zoning Board of Appeals of the City of Mount Vernon, 109 Misc. 2d 1080, 441 N.Y.S.2d 626. That case involved a parcel of 29.5 acres. Prior to the adoption of a zoning ordinance making the use nonconforming the Wartburg Orphan Farm School used all but six of these acres for a residential care facility for orphans and the aged. The court held that the Wartburg had a vested right to extend the use by the construction of an additional 30 units on the unused six acres, stating that "if the extension or expansion of the nonconforming use forms an integral part of the original contemplation for the entire parcel, then the right to such extension or expansion becomes vested from the inception and is likewise constitutionally protected." The court stated further:

> "The cottages and orphanages for children, the school, the administration building, the auditorium and the nursing home stand as monuments of its intent. There could not or should not have been any question that Wartburg intended to use this entire parcel for the care of orphans and the elderly." (441 N.Y.S.2d at p. 629)

In my opinion, the fact that you designated 136± acres out of a much larger parcel owned by you as the area to be devoted to bungalow colony use and the fact

that you provided facilities which would allow for the complete development of the site with bungalow units stand as monuments of your intent to develop the entire parcel for the nonconforming use and there could not or should not be any question as to your right to do so.

In Telimar Homes, Inc. v. Miller, 14 A.D.2d 586, 218 N.Y.S.2d 175, a property owner was held to have acquired a vested right to a nonconforming use as to its entire subdivision consisting of four section where a water system, roads, drainage system, model house construction and advertising were laid out and designed for the benefit of all four sections, where substantial construction had been commenced and substantial expenditures made which would have benefited all four sections, even though subdivision maps had been approved for only two of the sections prior to a zoning amendment increasing required lot size.

There are additional factors which would support a claim of vested rights specifically to the 264 additional units for which you applied in 1973. This claim would be independent of rights you have by reason of your existing nonconforming use under such cases as *United Citizens,* supra, and *Telimar Homes,* supra, and would be predicated upon wilful delay on the part of the town authorities in processing your application for approval of the map showing these units. It appears that you applied for such approval in October, 1973. The planning board refused to entertain the application upon the grounds that consideration thereof was precluded by a stop gap ordinance enacted by the Town (Local Law No. 1 of 1972) pending the adoption of a new ordinance, but in fact, as

the court subsequently determined, the stop gap ordinance was inapplicable to the requested approval. An appeal was taken by the planning board, but pending the appeal the 1974 ordinance was adopted and the appeal was withdrawn as moot. Under such circumstances it appears there was administrative procrastination calculated to deny your right to use your land in a then lawful manner and you would be entitled to the same vested rights you would have acquired if the planning board had acted in a timely fashion (Pokiok v. Silsdorf, 40 N.Y.2d 769, 390 N.Y.S.2d 49, and cases cited therein).

I suggest that you submit to the building inspector your map showing the location of the proposed additional 419 units and showing compliance with the restrictions of the 1962 ordinance which established the requirements for such use together with an application for as many of such units as you initially intend to build at one time.

Please let me know if I may be of further assistance to you in this matter.

Very truly yours,

/s/ Daren A. Rathkopf
Daren A. Rathkopf

DAR:jp

(3)

No. 91-649

IN THE

Supreme Court of the United States

October Term, 1991

MARVIN H. GREENE and LAKE ANNE REALTY CORP.,

Petitioners,

against

TOWN OF BLOOMING GROVE, SUPERVISOR AND TOWN BOARD OF THE TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE and BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

CHARLES G. MILLS
Counsel of Record for the Petitioners
56 School Street
Glen Cove, NY 11542
(516) 759-4300

DAREN A. RATHKOPF
Co-Counsel for Petitioners

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(7274—LC5-81—1991)

Table of Contents.

TABLE OF AUTHORITIES.

CASES:

Statement as to Corporate Parties.

No corporate party to this case has parents or subsidiaries.

No. 91-649

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

MARVIN H. GREENE and LAKE ANNE REALTY CORP.,

Petitioners,

against

TOWN OF BLOOMING GROVE, SUPERVISOR and TOWN BOARD OF THE TOWN OF BLOOMING GROVE, BUILDING INSPECTOR OF THE TOWN OF BLOOMING GROVE, PLANNING BOARD OF THE TOWN OF BLOOMING GROVE and BOARD OF ZONING APPEALS OF THE TOWN OF BLOOMING GROVE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS

Errors in matters raised for the first time by respondents in their brief in opposition to the petition require a reply brief.

I.

The United States Supreme Court should determine whether the wrongful failure to issue a building permit violates a substantial federal constitutional right.

Respondents argue at pages 12 through 14 of their brief that the obstinate and wrongful failure of a local government to issue a building permit either does not deny a substantial right of the applicant or only denies a right enforceable exclusively in the state courts. This argument finds clear support in *PFZ Properties, Inc. v. Rodriguez*, 928 F2d 28 (1st Cir. 1991), cert. granted ____ US ____ (November 12, 1991).

On the other hand the respondents' position is clearly contrary to the view of the majority of the circuits and is directly contrary to the prior decision of the court of appeals in this case, *Greene v. Town of Blooming Grove*, 879 F2d 1061 (2d Cir. 1989).

An affirmance by this Court of *PFZ Properties* could possibly determine the outcome of this case. Absent such an affirmance the argument at pages 12 through 14 is only an attempt to relitigate respondents' prior defeat in the court of appeals. This case should not be disposed of while *PFZ Properties* is undecided.

II.

There is conflict among the circuits.

Respondents now argue that all Second Circuit cases on the question in this case are consistent. If this is true it only makes clearer the conflict between the Second and Eleventh Circuits discussed in the petition. It also implies that

the Second and Fifth Circuits are in conflict on the question of whether the same rules apply to the construction of civil and admiralty pleadings.

III.

The facts found by the jury are conclusive.

At pages 15 and 16 of their brief respondents now argue for the first time that although the jury found a vested right of petitioner to a 136 acre bungalow colony, it did not necessarily find a right to build 419 units. This is contrary to the district court's instruction to the jury. "The issue for you the jury to decide is whether by virtue of the law of vested nonconforming use, as I will explain it, the plaintiffs have a vested nonconforming use to build the additional 419 bungalows on the full 136 acres."

In furtherance of this argument respondents state, at page 2, that approval was not found in the Town's files for 469 units and the "existence of such an approved plan was not demonstrated by the petitioners." What was demonstrated by petitioners to the obvious satisfaction of the jury was the existence of an approved plan for a 136 acre bungalow colony. Petitioners have never claimed that they already have approval for 419 specific units or that they are exempt from complying with the usual requirements to obtain the 419 building permits. The jury found, despite the Town's denial, that the Town had approved a 136 acre bungalow colony and that petitioners' vested rights extended to the whole 136 acres. This finding leads to the legal conclusion that the subsequent abolition of bungalow colonies is ineffective as to those 136 acres. Petitioners agree that they have to comply with all other usual requirements for their building permits.

Although respondents were unsuccessful at the trial in attacking the adequacy of petitioners' sewers they now mention for the first time, at page 7 of their brief, an unadjudicated post trial citation against those sewers. Similarly, although the adequacy of the recreational facilities—as shown on the approved plan exhibited to the jury—was tried extensively, respondents now argue, for the first time, at page 7, that petitioners do not have an approved recreational plan. Respondents cannot now relitigate these issues.

IV.

Declaratory judgment was appropriate.

Respondents argue at pages 14 through 17 of their brief that declaratory judgment was premature. The New York cases cited by them do not stand for the proposition that zoning boards of appeal must always decide claims of vested rights in the first instance, only that such boards must decide such claims when properly put before them. Zoning boards of appeal, as a matter of grace, can permit the expansion of a vested non-conforming use. For obvious reasons New York law does not require that one seek leave to expand a vested non-conforming use if all one wants is judicial vindication of it as it has actually vested.

New York has various remedies for various wrongs. Some are administrative and some are outgrowths of the prior prerogative writs. In this case the remedy is declaratory judgment. This case is not at all like *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). In that case Tennessee provided the developer and its successor bank with two administrative remedies: one was a precondition to the action complained of and the other was a monetary relief. Hamilton Bank was trying to

make an end run around both. Petitioners are merely seeking the remedy New York has provided for the wrong done to them. (Hamilton Bank would not even stand for the proposition that petitioners' claim under section 1983 was premature since it was based on a denial of procedural due process and not a taking without just compensation.)

CONCLUSION

A writ of certiorari should issue.

Dated: Glen Cove, New York
November 25, 1991

CHARLES G. MILLS IV
Counsel of Record for Petitioners
56 School Street
Glen Cove, NY 11542
(516) 758-4300